88-234

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FLORIDA POWER & LIGHT COMPANY, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA and
UNITED STATES NUCLEAR REGULATORY COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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August 10, 1988

QUESTIONS PRESENTED

1. Whether Section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1986), authorizes the Nuclear Regulatory Commission to impose a uniform annual license fee approaching $1 million on each nuclear power reactor where the fee is not related to use of specific services by particular feepayers or value received by them.

2. If Section 7601 does authorize such fees, whether the statute is an unconstitutional delegation of Congress' power to tax.

PARTIES

In addition to Florida Power & Light Company, the following parties were petitioners in the court of appeals: Alabama Power Company, Arkansas Power & Light Company, Baltimore Gas and Electric Company, Consolidated Edison Company of New York, Inc., Consumers Power Company, Duquesne Light Company, Georgia Power Company, Houston Lighting and Power Company, Illinois Power Company, Indiana & Michigan Electric Company, Iowa Electric Light and Power Company, Kansas City Power & Light Company, Kansas Electric Power Cooperative, Inc., Kansas Gas & Electric Company, Louisiana Power & Light Company, New York Power Authority, Northern States Power Company, Pacific Gas and Electric Company, Pennsylvania Power & Light Company, Southern California Edison Company, System Energy Resources, Inc., The Cleveland Electric Illuminating Company, The Toledo Edison Company, TU Electric, Union Electric Company, Washington Public Power Supply System, Wisconsin Electric Power Company, and the Yankee Atomic Electric Company. The United States Nuclear Regulatory Commission and the United States of America were respondents in the court of appeals. A complete list of all the parties joining in this petition, and their parent corporations, subsidiaries, and affiliates, is reproduced in the Appendix ("App.") at App. 65a.

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Petitioners respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit in *Florida Power & Light Company v. United States*, 846 F.2d 765 (D.C. Cir. 1988).

OPINIONS BELOW

The opinion of the court of appeals is reported at 846 F.2d 765 and reproduced at App. 1a. The final rule of the Nuclear Regulatory Commission reviewed below, issued on September 16, 1986, is entitled "Annual Fees for Power Reactor Licenses and Conforming Amendment," 51 Fed. Reg. 33,224, 34,082 (1986), *codified at* 10 C.F.R. Part 171 (1987). App. 33a.

JURISDICTION

The judgment of the court of appeals was rendered on May 13, 1988. No petitions for rehearing have been filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS

This case involves Section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub. L. No. 99-272, 100 Stat. 146-47, 42 U.S.C. § 2213, App. 62a, and 10 C.F.R. Part 171 (1988), App. 55a.

STATEMENT OF THE CASE

A. Nature of the Case

The issue here is the extent to which the Nuclear Regulatory Commission ("NRC" or "Commission") is authorized to impose annual fees on its licensees under Section 7601 of COBRA. Petitioners[1] seek review of a judgment of the United States Court of Appeals for the District of Columbia Circuit upholding a final NRC rule that imposes annual fees on nuclear power reactor licensees based on Section 7601.[2] These annual fees currently approach $1 million for each nuclear power reactor.

The decision of the court below conflicts with a recent Federal district court decision, *Mid-America Pipeline Co. v. Dole,* No. 86-C-815E (N.D. Okla. filed Sept. 4, 1986), which is already on appeal to this Court. *Burnley v. Mid-America Pipeline Co.,* No. 87-2098, October Term, 1987. In that case, which involves the same issues as the present case, the lower court struck down fees imposed by the Department of Trans-

[1] Petitioners are 29 companies who own and/or operate nuclear power reactors in the United States and are subject to the annual NRC fees challenged in this case.

[2] Petitioners sought review of this final *NRC* rule in the court below pursuant to 28 U.S.C. § 2342(4) and 42 U.S.C. § 2239.

portation ("DOT") under Section 7005 of COBRA, 100 Stat. 140, 49 U.S.C. App. § 1682a.

B. The Regulatory Framework

Since 1978, the NRC has administered a comprehensive system of license fees (*codified at* 10 C.F.R. Part 170) under the authority of the Independent Offices Appropriation Act of 1952, Pub. L. No. 97-258, 65 Stat. 290, 31 U.S.C. § 9701 ("IOAA"). App. 64a. In accordance with decisions of this Court and others,[3] the NRC fees under the IOAA are charged to each licensee-beneficiary for the cost of specific services provided to that licensee.

The Commission issued its rule adopting annual fees under COBRA Section 7601(b) on September 18, 1986. 51 Fed. Reg. 33,224 (1986), App. 33a. The rule retains the IOAA fees under 10 C.F.R. Part 170 and adds the Section 7601(b) annual charges under a new Part 171.

To calculate the annual charges, the Commission began with a "cost basis" comprised of the costs of all the NRC programs and activities for which the Commission sought recovery through the annual charges. 51 Fed. Reg. 24,078-82 (1986); 51 Fed. Reg. 33,224-31 (1986), App. 35a-61a. These costs relate to programs and activities that mostly serve broad interests of the general public, such as public health and safety, and are essentially the costs of regulation or of activities supporting regulation. For example, out of $124 million in the total cost basis, the majority, $74 million, is for research activities. 51 Fed. Reg. 33,226, App. 42a-43a. The Commission has described the research activities included in the cost basis as follows,

> Under the NRC's Research Program, scientists and engineers in a variety of disciplines related to the regulation and understanding of nuclear power accumulate and analyze a wide variety of data and perform both theoretical and experimental studies.

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[3] *See* discussion, *infra*, at 9-10.

> Overall, the work supported by NRC research funding aims at reducing the risks of nuclear power and improving the efficiency of regulation.[4]

The Commission has further described this research by saying that it "promotes a rise in the general level of knowledge." [5]

Section 7601(b) states that the "Commission shall assess and collect annual charges from its licensees. . . ." The NRC's regulation, however, imposes the annual fees solely on those who possess a license to operate a nuclear power reactor. Excluded entirely from the annual charges are major nuclear material licensees (including large uranium processing operations), nuclear power related vendors, small materials licensees, and test and research reactor licensees.

To determine the amount of the annual fee, the NRC's regulation provides that if the cost basis is less than the maximum allowed under Section 7601(b) (33 percent of the total NRC budget less other fees collected by the NRC), then the annual fee is calculated by dividing the cost basis by the number of nuclear power reactors with operating licenses. If the cost basis is more than the statutory maximum, then the maximum is divided by the total number of such reactors. All licensees subject to the fee are consequently charged the same amount per reactor despite substantial differences, such as the age, size, type, and output of their reactors. The annual fee calculated on this basis for fiscal year 1987 was $950,000 per license. Because the final NRC budget for fiscal 1987 turned out to be slightly less than estimated, and IOAA fees and the number of licensees turned out to be more, the final fee for the fiscal year was adjusted to $838,000.[6]

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[4] Brief for Government Respondents U.S.N.R.C. et al. at 24, *Florida Power & Light Co. v. United States,* (D.C. Cir. filed July 31, 1987) Nos. 86-1512, 86-1567 and 86-1571 ("NRC Brief Below").

[5] *Id.*

[6] For fiscal 1988, the Commission has proposed to raise the annual fees to more than $1 million for each nuclear power reactor, 53 Fed. Reg. 24,077 (1988), relying upon the authority in Section 5601 of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330-275, 42 U.S.C. § 2213.

C. Decision of the Court Below

On May 13, 1988, the court of appeals upheld the NRC annual fees in a 2 to 1 decision. App. 1a. Writing for the majority, Judge Nies stated that the agency's implementation of the statute was not arbitrary or capricious. In particular, Judge Nies concluded that Congress must have intended that the NRC recover the costs of regulatory services that are not recoverable under the IOAA and that therefore the agency may recover the costs of "generic" services that have no specific, identifiable beneficiaries. The majority treated this Court's decision in *National Cable Television Ass'n, Inc. v. United States,* 415 U.S. 336 (1974), as providing no precedent for interpreting COBRA, apparently believing that the decision applied only to the IOAA.

The majority opinion also stated that *National Cable* did not hold that delegation of the taxing power would be unconstitutional. The majority assumed that delegation of the power to tax is not analyzed differently than any other delegation of legislative power. The majority concluded that the broad standards under COBRA were similar to the standards in other previously upheld delegations, and therefore these standards were sufficient to allow the delegation to the NRC of the power to impose its annual charges.

In dissent, Judge Starr found in the statutory mandate that the COBRA fees must be "reasonably related to the regulatory service provided", a requirement that the fees be related to benefits to the feepayers. Judge Starr concluded that the majority, as well as the NRC, had read out of COBRA any requirement that the annual fees be related to specific benefits to identifiable beneficiaries. Judge Starr also noted that in determining the annual fees under COBRA, the NRC, contrary to well-established precedent, failed to exclude costs that provide independent public benefits.

Moreover, Judge Starr read *National Cable* as setting forth a general principle of interpretation applicable to all user fee statutes, not just to the IOAA. Absent language expressly delegating the power to impose taxes unrelated to benefits

received, the courts are to interpret fee statutes as imposing charges on beneficiaries only for value received, thereby avoiding constitutionally suspect delegation of taxing powers. Judge Starr wrote,

> Thus, the requirement that fees be tied to specific benefits is a requirement of fee statutes generally; it is not an IOAA idiosyncracy. Indeed, I am aware of no case (and we are cited to none) interpreting a fee statute in which the requirement of a nexus between costs and benefits has not been imposed.

App. 26a.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW, WHICH THE COURT BELOW DECIDED ERRONEOUSLY AND IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS

This case presents an important question of Federal law—whether Section 7601 of COBRA authorizes the NRC to impose substantial annual charges on some of its licensees where the fee is not related to specific services to particular feepayers or value received by the feepayers. The importance of this case transcends the particular industry involved because Congress has increasingly turned to delegations of fee authority to finance Federal programs. *See* Note, *Constitutional Problems with the COBRA and OBRA Fee Schedules,* 9 Energy L.J. 107 (1988). The issues here, therefore, are likely to recur and require this Court's attention.

Indeed, the basic questions are already before this Court in *Burnley v. Mid-America Pipeline Co.* That case involves Section 7005 of COBRA, which directs DOT to impose fees on natural gas and hazardous liquid pipelines to cover the costs of federal pipeline safety programs. On February 8, 1988, the United States District Court for the Northern District of Oklahoma

struck down these fees as an unconstitutional delegation of the power to tax. The DOT fees were found to be taxes under *National Cable* because they were not related to specific benefits to the feepayers, a characterization equally true of the NRC fees. The court held the delegation of the power to set the DOT fees unconstitutional because Section 7005 gave DOT unconstrained discretion to set the amount of the fees to be borne by the individual feepayers, also equally true of the NRC fees.

The Government has now appealed *Mid-America Pipeline* to this Court. Jurisdictional Statement, *Burnley v. Mid-America Pipeline Company,* No. 87-2098 (June 23, 1988). As the Government notes in that appeal, *Id.* at 7, the District of Columbia Circuit's decision in the present case is in direct conflict with the decision in *Mid-America Pipeline.* The Government emphasizes, and we agree, that the similar questions presented by the two cases are substantial. *Id.* at 7-17.

The delegation to DOT in Section 7005 is similar in breadth to the delegation to NRC in Section 7601. If anything, the question is presented more starkly by Section 7601. Section 7005 specifies the exact amount to be collected through the DOT fees—the cost of the pipeline safety programs—while Section 7601 in the present case fixes no amount to be recovered, merely establishing a 33 percent ceiling. Section 7005 directs that the fees bear "a reasonable relationship to volume-miles, revenues or an appropriate combination thereof. . . ." Section 7601 provides merely that the fees "shall be reasonably related to the regulatory services provided" and "fairly reflect the cost to the Commission of providing such service."

Congress has also directed the Federal Energy Regulatory Commission ("FERC") to impose fees on oil and gas pipelines and public utilities to finance FERC programs. Section 3401, Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509, 100 Stat. 1890, 42 U.S.C. § 7178. The fees adopted by FERC under this provision[7] are under challenge in six consoli-

[7] Section 3401 directs FERC to assess fees "in amounts equal to all of the costs incurred by the Commission" on the basis of any "methods that the Commission determines by rule to be fair and equitable."

dated proceedings in the District of Columbia Circuit. *Interstate Natural Gas Ass'n. of America v. FERC,* Nos. 87-1570, et al. (D.C. Cir. filed Oct. 9, 1987). The FERC fees are also under challenge before the same Federal district court which struck down Section 7005 of COBRA as unconstitutional. *Mid-America Pipeline Co. v. FERC,* No. 87-C-571E (N.D. Okla. filed July 20, 1987). In these cases, the FERC fees are being challenged on many of the same grounds as petitioners challenge the NRC fees here.[8]

Petitioners submit that this Court should clarify the limitations on such user fees and reaffirm the continuing vitality of *National Cable* and its progeny. Moreover, the majority below decided the important questions of Federal law presented by this case erroneously and in conflict with *National Cable* and other applicable decisions of this Court and other Federal courts. Because Section 7601 of COBRA does not contain a clear and express statement of the delegation of the power to tax, *National Cable* requires that the statute be interpreted as delegating to the NRC only the authority to impose user fees to recover the costs of specific services providing value directly to identifiable beneficiaries. Costs that do not meet that criterion, such as regulatory costs that provide independent public benefits, must be excluded from the fees. The NRC user fees clearly do not comply with these requirements and, Petitioners submit, must therefore be struck down.

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[8] In addition, Congress has directed other agencies to assess and collect fees. In Section 5002 of COBRA, 100 Stat. 117, 47 U.S.C. §§ 156, 158, Congress authorized the Federal Communications Commission to impose charges to recover the costs of its regulatory service. Similarly, in Section 13031 of COBRA, 100 Stat. 308, 19 U.S.C. § 58c, Congress established fee-setting authority for the U.S. Customs Service. In Section 10511 of the Omnibus Budget Reconciliation Act of 1987, 100 Stat. 1330-446, 26 U.S.C. § 7801, Congress directed the Secretary of Treasury to establish fees to recover costs for activities of the Internal Revenue Service.

A. Section 7601 of COBRA Does Not Authorize the NRC Annual Fees

1. *National Cable* Established a General Principle of Interpretation Applicable to All Fee Statutes, Not Just the IOAA

In *National Cable,* the Court struck down annual fees which the Federal Communications Commission had imposed under the IOAA. Despite the broad language of the IOAA, the Court held that fees can be charged only for specific services which provide value individually to the feepayer, and the amount of the fees must reflect no more than the costs of providing such services. The fees could not be used as a revenue raising device to finance services that benefit the public at large.

The Court reasoned that general charges which did not comply with these requirements would resemble a "tax," not a "fee," and Congress "is the sole organ" with the power to impose taxes. Because delegation of taxation powers "would be such a sharp break with our traditions," and to avoid raising the problem of the unconstitutionality of any such delegation, the Court indicated that it would not read a statute to provide for such delegation unless the statute included a clear and explicit statement to that effect. The Court found no such clear and explicit statement in the IOAA. Consequently, agencies only have authority under the IOAA to assess and collect fees, not taxes. The Court contrasted taxes, which can be "arbitrary" and unrelated to benefits received, with fees, which charge the feepayer for benefits "not shared by other members of society." 415 U.S. at 340-41.

National Cable's rationale did not stem from a survey of the IOAA statutory language or legislative history. Rather, the decision reflects constitutionally based concerns that apply to all fee statutes. Absent statutory language expressly delegating the power to impose taxes unrelated to benefits received, the courts, under the doctrine of *National Cable,* are to interpret such

statutes as providing for user fees which charge each feepayer only for the cost of services providing value to that feepayer.[9]

The *National Cable* doctrine has been followed and further elaborated in other decisions involving the IOAA.[10] Recognizing that *National Cable* set forth principles of interpretation that govern user fee legislation generally, the courts have also applied these principles in interpreting many other user fee statutes.[11]

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[9] The Court has construed other statutes narrowly to avoid unconstitutional delegations. *See, e.g., Industrial Union Department v. American Petroleum Institute*, 448 U.S. 607 (1980). *See also DeBartolo Corp. v. Florida Gulf Coast Building & Const. Trades Council*, 108 S.Ct. 1392, 1397 (1988) (Court will construe statutes to avoid constitutional problems, unless such construction is plainly contrary to the intent of Congress).

[10] *See, e.g., FPC v. New England Power Co.*, 415 U.S. 345 (1974); *Central and S. Motor Freight Tariff Association v. United States*, 777 F.2d 722 (D.C. Cir. 1985); *Central and S. Motor Freight Tariff Association v. United States*, 777 F.2d 722 (D.C. Cir. 1985); *National Cable Television Association v. FCC*, 554 F.2d 1094 (D.C. Cir. 1976) ("*National Cable II*"); *Electronic Industries Association v. FCC*, 554 F.2d 1109 (D.C. Cir. 1976); *National Association of Broadcasters v. FCC*, 554 F.2d 1118 (D.C. Cir. 1976); *Capital Cities Communications, Inc. v. FCC*, 554 F.2d 1135 (D.C. Cir. 1976).

[11] *See In Re Jenny Lynn Mining Co.*, 780 F.2d 585 (6th Cir.), *cert. denied*, 477 U.S. 905 (1986) (Ohio state strip mining law); *Sohio Transportation Co. v. United States*, 766 F.2d 499 (Fed. Cir. 1985) (Mineral Lands Leasing Act); *United States v. River Coal Co.*, 748 F.2d 1103 (6th Cir. 1984) (Surface Mining Control and Reclamation Act of 1977); *Nevada Power Co. v. Watt*, 711 F.2d 913 (10th Cir. 1983) (Federal Land Policy and Management Act); *Yosemite Park and Curry Co. v. United States*, 686 F.2d 925 (Ct. Cl. 1982) (National Park Service Organization Act); *City of Vanceburg v. FERC*, 571 F.2d 630 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978) (Federal Power Act); see also *Mid-America Pipeline, supra*, (Section 7005 of COBRA). Numerous state court decisions have also applied *National Cable* principles in construing state statutes. *See, e.g., Crocker v. Finley*, 99 Ill.2d 444, 459 N.E.2d 1346 (1984); *Emerson College v. City of Boston*, 391 Mass. 415, 462 N.E.2d 1098 (1984); *see also National Cable II*, 554 F.2d at 1106 & nn.42-43 (citing state cases). The Administrative Conference of the United States has similarly recognized these principles. *See* Administrative Conference of the United States Recommendation 87-4, 52 Fed. Reg. 23,634 (1987) *codified at* 1 C.F.R. § 305.87-4 (1988) ("A government service for which a user fee is charged should directly benefit fee payers. . . ."); Gillette and Hopkins, *A Report to the Administrative Conference of the United States on Federal User Fees—Part A: Analysis of Legal and Economic Issues* at 51-52, 95 (May 1987).

2. The *National Cable* Principle of Interpretation Is Based on Important Constitutional Concerns

The aversion to delegation of the taxing power evidenced in *National Cable* is well justified. Article I, Section 8, Clause I of the United States Constitution grants to Congress the power "To Lay and Collect Taxes, Duties, Imposts and Excises." This power of taxation is broad and open-ended. Congress may impose arbitrary taxes under almost any policy principle it chooses, without limiting the assessment to any benefit or value received. As the Supreme Court said in *National Cable,*

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the government on a taxpayer and go solely on ability to pay, based on property or income.

415 U.S. at 340.

Accordingly, the courts have no basis for restraining Congress properly exercised choice of either the object of taxation or the amount assessed, apart from the most minimal equal protection requirements. *United States v. Kahriger,* 345 U.S. 22, 28 (1953); *Fernandez v. Wiener,* 326 U.S. 340, 352 (1945); *License Tax Cases,* 72 U.S. (5 Wall.) 462 (1868). Because this taxation power is so open-ended and removed from judicial constraint, it should not be delegated to unelected officials remote from the political process.[12]

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[12] As one commentator has said of *National Cable,*

> The Court's delegation concern in this case was a plausible one. Exercises of general taxing power are, as a practical matter, not susceptible to ordinary methods of judicial review. *See generally* Ely, *Legislative and Administrative Motivation in Constitutional Law.* 79 Yale L.J. 1205, 1235 (1970). The same discretionary character of taxation that ordinarily shields it from effective judical review would also make legislative oversight of a delegate difficult. Therefore, it seems likely that the taxation power, if it is to be exercised legitimately, may be exercised only by Congress itself.

L. Tribe, *American Constitutional Law* § 5-17, at 366 n.15 (2d ed. 1988).

Such a broad based, open-ended power to impose arbitrary taxes unrelated to benefits should be reserved to the Congress. Mandating that decisions regarding taxation be made by those most directly accountable through our democratic processes maximizes the control of the people over this critical power and minimizes the danger of abuse. *See McCulloch v. Maryland,* 17 U.S. (4 Wheat) 316, 428 (1819); J. Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 85-88 (1978).

In sharp contrast to the unconstrained nature of taxes, user fees, as defined by *National Cable,* are sharply limited as to who will pay and the amount to be paid. The fees can be assessed only against those who individually receive specific, direct benefits from the agency, usually through their own voluntary application. And the amount of the fee is limited to the agency's costs in providing the benefit. With such restrictions, the power to assess user fees can be delegated without raising the problems associated with delegation of the power to assess arbitrary taxes. Contrary to the majority opinion below, App. 18a, the issue here does not involve a metaphysical debate over whether the NRC annual charge is a "fee" or a "tax." The issue is instead whether delegated power to assess monetary exactions will be subject to the clear limits defined by *National Cable,* or will be open-ended without meaningful restriction.

3. In Accordance with *National Cable,* COBRA Must Be Interpreted as Delegating to the NRC Only the Authority to Impose Fees to Recover the Costs of Specific Services Providing Value Directly to Identifiable Beneficiaries

National Cable held that because the IOAA lacked a clear and express statement delegating the power to impose taxes unrelated to benefits received, it must be narrowly interpreted as providing for user fees which charge each beneficiary only for the costs of services providing value received by that beneficiary. But Section 7601 of COBRA contains no more of a

clear and express statement delegating the power to tax than does the IOAA.[13] *National Cable* and its progeny consequently require that Section 7601 also be interpreted as providing for more limited user fees. As Judge Starr noted below, COBRA presents "the identical situation" that confronted this Court in *National Cable* "when it first addressed the IOAA," and, therefore, COBRA must also be construed narrowly. App. 29a. Contrary to the contentions of respondents below, this is not an argument that fees under COBRA must comply with the statutory standards of the IOAA or that the IOAA provides the constitutional outer limits of delegable fee setting authority. Rather, it is a recognition that *National Cable* established a general principle of interpretation which applies fully to Section 7601 of COBRA.

The NRC itself has repeatedly stated that Section 7601 delegates very broad fee-setting authority with no clear or controlling standards and that the Section's language is not clearly distinguishable from the IOAA's.[14] Moreover, the specific terms of Section 7601 seem to track the principles set down by *National Cable* and its progeny, as Judge Starr noted below. App. 25a. Congress must be presumed to have been aware of this prior judicial construction of the language it used in a similar context, and that language should be interpreted in the same way. *Blitz v. Donovan*, 740 F.2d 1241, 1245 (D.C. Cir.

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[13] Section 7601 states that its charges "shall fairly reflect the cost to the Commission" and the IOAA states that its charges "shall be . . . based on the costs to the government." Section 7601 states that its charges "shall be reasonably related to the regulatory service provided by the Commission" and the IOAA states that its charges "shall be . . . based on . . . the value of the service . . . to the recipient." App. 63a, 64a.

[14] United States Nuclear Regulatory Commission, Report on User Fees to Senate Committee on Environment and Public Works, Subcommittee on Nuclear Regulation, April 15, 1986 ("NRC Report on User Fees"), at 10; United States Nuclear Regulatory Commission, Report on the Assessment and Collection of Annual Charges, July 7, 1986 ("NRC Report on Annual Charges"), at 5, *see also, infra*, at 17.

1984). 2A Sutherland, *Statutory Construction* § 49.19 at 400, § 51.02 at 454 (4th ed. 1985).[15]

If Congress had intended to adopt a wholly new and expanded fee setting authority that sharply departed from prior law, which this Court has emphasized would raise serious constitutional questions, surely there would have been substantial congressional discussion and debate. But there was none. As Judge Starr wrote below, "it is . . . wholly inappropriate to assume that, without having made its intention express, Congress empowered the NRC to enter into what, at best, must be regarded as a constitutionally unchartered [sic] area." App. 29a. Justice Marshall made the same point regarding the IOAA,

> [S]ince the broader view that the full cost of regulation should be assessed those subject to the agency's jurisdiction in the absence of a "special benefit" would have represented a controversial policy choice, I think that the very lack of debate over this provision of the Act and the ease with which it passed compel the more limited interpretation.

FPC v. New England Power, 415 U.S. at 357 (Marshall, J., concurring).[16]

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[15] Judge Starr also noted that the Section 7601 language requiring the fee to be related to the regulatory service provided can only mean that there must be a nexus or relationship between the fee and the benefit to the feepayer charged, as *National Cable* and its progeny have required. App. 24a-25a.

[16] In interpreting Section 7601, the majority below relied heavily on a statement inserted in the Congressional Record which describes the section as intended,

> to establish a standard separate and distinct from the Commission's existing authority under the [IOAA] in order to permit the Commission to more fully recover the costs associated with regulating various categories of Commission licensees.

132 Cong. Rec. H879 (daily ed. Mar. 6, 1986). But this statement does not tell us what the "standard separate and distinct" is, and it certainly does not provide *National Cable's* prerequisite to delegation of the taxing power—a clear and express standard authorizing taxation unrelated to specific benefits to the feepayers. In *National Cable,* a congressional Conference Committee

(footnote continues)

The majority below failed to recognize that *National Cable* established a rule of interpretion applicable to Section 7601. It discussed the case only in regard to the constitutionality of Section 7601, not its interpretation. The majority's ruling decimates the meaning and significance of *National Cable*, limiting it to a narrow ruling regarding the IOAA. In so doing, the court erroneously interpreted Section 7601, and eliminated an important safeguard ensuring democratic accountability and control over the power to tax.

4. The NRC Annual Fees Clearly Do Not Comply with the *National Cable* Standards

There can be no doubt that the NRC annual fees imposed under Section 7601 fail to comply with the *National Cable* standards. The Commission does not seriously contend that they comply, and the court below did not so hold. As discussed, *supra*, at 3-4, the Section 7601 annual fees impose on NRC nuclear power reactor licensees, on a simple per reactor basis, the costs of programs and activities essentially serving broad interests of the general public, such as public health and safety, rather than charging each licensee for specific services providing particular benefits to that licensee, as required by *National Cable*. The NRC has in fact repeatedly contrasted its fees under Part 170, which it noted complied with the *National*

(footnote continued)

had directed the FCC to adjust its fee schedule as it did "to fully support all its activities so that taxpayers will not be required to bear any part of the load," 415 U.S. at 339, and the Supreme Court struck down the fees for doing precisely that. That IOAA legislative history did not change the result in *National Cable*, and the very similar legislative history here makes *National Cable's* applicability all the more apparent.

In the present case, the majority below asked if Section 7601 did not expand the Commission's preexisting authority under the *National Cable* standards, what was its purpose? But under *National Cable*, delegation of the power to tax unrelated to specific benefits cannot be read into a statute on the grounds that Congress "must have" intended something different than the IOAA. Rather, a clear and express statement of the delegation of such a power must be included in the statute, and no such clear and express statement was included in COBRA. As Judge Starr demonstrated below, the *National Cable* principles could be applied to Section 7601 in a variety of ways without "defeat[ing] COBRA's purpose." App. 19a, 27a-28a, 31a.

Cable standards, with the new fees, which the NRC has admitted do not. 51 Fed. Reg. 24,087 (1986); 51 Fed. Reg. 33229, App. 53a-54a NRC Report on User Fees, *supra*, p. 13, at 3; NRC Report on Annual Charges, *supra*, p. 13, at 2.[17]

Indeed, the NRC made no effort to exclude from its COBRA fees the costs for services providing an independent public benefit, rather than specific benefits to the particular licensees paying the fees. As Judge Starr noted below, "But there is nothing in the record to indicate that the agency made *any* effort to isolate fees that amount to a payment for an independent public benefit." App. 30a (original emphasis). The court in *Mississippi Power and Light Co. v. NRC*, 601 F.2d 223, 231 n.17 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980), defined an activity providing an independent public benefit as one the agency undertakes "on its own instigation in support of a general agency program expected to have a significant benefit both for the public and for private recipients as yet unidentified." The activities included in the cost basis for the COBRA fees are precisely those undertaken by the NRC "on its own instigation" in support of its general agency programs, for the benefit of the public and/or "private recipients as yet unidentified." *See, supra*, at 3-4.

The court below, therefore, erred in failing to strike down the Section 7601 annual fees under the *National Cable* doctrine.

B. If Section 7601 Authorizes the NRC Annual Fees, Then the Statute Is an Unconstitutional Delegation of the Power to Tax

If Section 7601 does authorize the NRC annual fees despite their failure to comply with the *National Cable* standards, then Section 7601 is an unconstitutional delegation of the power to tax. For without the *National Cable* standards, what remains is not only insufficient to guide the important power delegated in Section 7601, it is meaningless.

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[17] *See also Gillette & Hopkins, supra*, p. 10, at 77 (characterized the NRC annual fees by saying "the user fee in this situation has become largely a revenue raising device" which "although denominated a charge or user fee, is indistinguishable from a redistributional tax.").

Certainly the supposed standards in Section 7601, if they authorize these NRC annual fees, provide no meaningful guidance or limitation. If the requirement that the charges "shall be reasonably related to the regulatory service provided" can include services provided to the general public or others beyond those paying the fees charged, then effectively no services are excluded by this supposed standard and the NRC's discretion is not guided in any way. Similarly, if the requirement that the charges "shall fairly reflect the cost to the Commission of providing such service" can include costs for services provided to the general public or others beyond the feepayers, then again no costs are excluded by this supposed standard and the NRC is provided no guidance or limitation. Indeed, the NRC itself has advised Congress that Section 7601 set forth "very broad legislative delegation of fee-setting authority without any controlling standards." [18]

The virtually unlimited discretion granted to the NRC by Section 7601 under the Commission's interpretation is already revealed by experience. Although Section 7601 states that the annual fees are to be imposed on the Commission's "licensees," the Commission claims discretion to exclude any group of licensees from the fees. For example, as originally proposed for comment, the Commission's annual fees would have imposed the annual charges on major materials licensees as well as power reactor licensees. The Commission said, "fairness requires that they [materials licensees] bear a fair share of their regulatory costs." 51 Fed. Reg. 24,082 (1986). But the final regulation excluded the major materials licensees without explanation. App. 35a. Therefore, the Commission in effect claims discretion to determine which of its licensees to subject to the fees.

The Commission also claims discretion to impose annual charges on a flat per capita basis among its chosen feepayers, unrelated to any variation among them in terms of reactor type

[18] Letter from Nunzio J. Palladino, Chairman, Nuclear Regulatory Commission, to Senator Alan K. Simpson, Chairman, Subcommittee on Nuclear Regulation, Committee on Environment and Public Works, United States Senate, October 1, 1985.

or size, performance history, or other factors. But the NRC claims as well the discretion to fashion variable fees that take any or all these factors into account. *See, e.g.,* NRC Brief Below, *supra,* p. 4 at 27, n.17. Indeed, the Commission has just proposed a revised fee system which purports to consider differences among reactors in establishing annual fees. 53 Fed. Reg. 24,077 (1988).

Consequently, absent the *National Cable* limitations, Section 7601 leaves the Commission free to determine who among its universe of licensees have to pay, and to select among a number of possible standards in determining how much each will pay. The result is that fees for any particular licensee could range from $0 to $1 million per year or more. This delegation is not merely a matter of the NRC determining facts or details within overall policy guidelines set by Congress.

Indeed, if the power the NRC claims under Section 7601 is allowed, then there is no serious limitation on delegation of the taxing power. Congress could delegate to an agency the power to raise taxes to balance the budget, subject to the limit that total taxes be no higher than the government's total costs, and guided by standards as vague as those in Section 7601.

Allowing such broad discretion to impose taxes to be delegated would seriously undermine control over the taxation power through the democratic process. It would remove the direct accountability of elected officials for the exercise of the critical taxing power carefully and expressly granted to them in the Constitution. Moreover, unelected officials would exercise such power with only the most minimal judicial constraints. *See* discussion, *supra,* at 11-12.

Because of these considerations, numerous courts have indicated that Congress cannot constitutionally delegate the power to impose taxes. *National Cable,* 415 U.S. at 340 ("Congress .... is the sole organ for levying taxes...."); *Central & S. Motor Freight Tariff Ass'n,* 777 F.2d at 725 (charges beyond the recovery of benefits conferred upon "identifiable beneficiaries" are more "conceptually akin to taxes

which could, of course, be levied only by Congress."); *Sohio Transportation Co.,* 766 F.2d at 503 (the recovery of an agency's "expenditures for the public interest" through the collection of fees "would constitute an unconstitutional delegation of Congress' exclusive power to tax."); *National Ass'n of Broadcasters,* 554 F.2d at 1129, n.28 ("Once agency charges exceed their reasonable attributable costs they cease being fees and become taxes levied, not by Congress, but by an agency. This, the cases hold, is prohibited."); *Mississippi Power & Light Co.,* 601 F.2d at 227 (affirms "the constitutional mandate that only Congress has the 'power to levy and collect taxes.' "); *Mid-America Pipeline Co. v. Dole,* slip op. at 12 (finding that Section 7005 of COBRA "is an unpermissible delegation of the legislative power to assess taxes.")[19]

These authorities strongly support the view that delegation of the power to impose charges unrelated to specific benefits to the particular feepayers is unconstitutional. The discretion in such a delegation is inherently too broad and without meaningful standards and limitations. Such a delegation effectively allows an agency to exercise Congress' broad constitutional authority to levy taxes for the "General Welfare," financing programs that benefit the general public.

The majority below interpreted *Hampton v. United States,* 276 U.S. 394 (1928), as approving delegations of the taxing power. App. 18a-19a. But the power delegated in *Hampton* was a mechanical, technical calculation with no policy discretion delegated to the executive. The agency was to assess the direct customs duty under the formula set by Congress whenever the conditions set by Congress were found. The other cases cited by the court below all involved non-tax delegations. App. 19a-20a.

Even if delegation of the taxing power is not per se unconstitutional, the standards of Section 7601 are insufficient to allow the delegation of the important power to assess taxes unlimited by the *National Cable* standards. Delegation of this

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[19] *See also* L. Tribe, *supra,* p. 11, at 366, n.15; J. Freedman, *supra,* p. 12, at 88; Note, *supra,* p. 6, at 109-110.

critical power should be subject to stricter requirements than other delegations. Note, *The Assessment of Fees by Federal Agencies for Services to Individuals,* 94 Harv. L. Rev. 439, 443 (1980) (even if the taxing power is delegable in certain circumstances, the legislature must provide "standards more specific than normally are required to guide the exercise of agency discretion"). *See also, Synar v. United States,* 626 F.Supp. 1374, 1385-86 (D.D.C.) (per curiam), (constitutionality of a delegation depends upon "the scope of the power . . . *plus* the specificity of the standards governing its exercise.") *aff'd on other grounds sub. nom. Bowsher v. Synar,* 106 S.Ct. 3181 (1986). But even under the usual requirements for a permissable delegation, the delegation in Section 7601 would be unconstitutional.[20] As discussed above, if the NRC's interpretation of Section 7601 is correct and the Commission's annual fees are authorized, then the statute's standards are effectively meaningless. *Supra,* at 17-18. In particular, the standards leave the NRC free to determine within the universe of its licensees who shall pay and how much they will pay. *Supra,* at 18.

Consequently, if Section 7601 authorizes the NRC annual fees, the statute is an unconstitutional delegation of the power to tax and the NRC annual fees assessed under it should be struck down.

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[20] Several commentators have recently suggested that the delegation doctrine should in fact require Congress to provide truly meaningful standards circumscribing the delegated power, not vague platitudes. *See* Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?* 83 Mich. L. Rev. 1223 (1984); Aranson, Gellhorn, and Robinson, *A Theory of Legislative Delegation* 68 Cornell L. Rev. 1 (1981); J. Freedman, *supra,* p. 12; L. Tribe, *supra,* n. 11, § 5-17, at 362-369.

CONCLUSION

For the reasons stated, a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be issued and the case set for plenary review.

Respectfully submitted,

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August 10, 1988

APPENDIX A

FLORIDA POWER & LIGHT COMPANY, et al.,
Petitioners,

v.

UNITED STATES of America and Nuclear Regulatory Commission,
Respondents.

WISCONSIN ELECTRIC POWER COMPANY, et al., Petitioners,

v.

UNITED STATES of America and Nuclear Regulatory Commission,
Respondents.

ARKANSAS POWER & LIGHT COMPANY, et al., Petitioners,

v.

UNITED STATES of America and Nuclear Regulatory Commission,
Respondents.

Nos. 86-1512, 86-1567 and 86-1571.

United States Court of Appeals,
District of Columbia Circuit.

Argued Sept. 21, 1987.

Decided May 13, 1988.

Before RUTH BADER GINSBURG, STARR and NIES*, Circuit Judges.

Opinion for the court filed by Circuit Judge NIES.

Dissenting opinion filed by Circuit Judge STARR.

NIES, Circuit Judge, sitting by designation:

In three consolidated cases, thirty-one nuclear power reactor licensees (petitioners) seek to invalidate a final rule entered on September 16, 1986, by the Nuclear Regulatory Commission ("NRC" or "Commission"), which imposes a uniform "Annual Fee" on those licensees for the fiscal year 1987. "Annual Fee for Power Reactor Operating Licenses and Conforming Amendment," 51 Fed.Reg. 33,224 (Sept. 18, 1986), *corrected at* 52 Fed.Reg. 34,082 (Sept. 25, 1986), *codified at* 10 C.F.R. pt. 171 (1987). The Annual Fee was imposed under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), Pub. L. No. 99-272, 100 Stat. 82 (1986), which became effective on April 7, 1986.

Petitioners argue, first, that the NRC violated the standards contained in COBRA for imposition of a fee. Second, they maintain that if COBRA were interpreted to authorize NRC's annual flat fee, then the measure would constitute an unconstitutional delegation of Congress' power to tax. In addition, petitioners assert procedural errors in promulgation of the rule which, they allege, deprived them of a meaningful opportunity to comment on the NRC rule and preclude meaningful appellate review. After reviewing petitioners' numerous variations on the above arguments,[1] we conclude that no sufficiently persuasive ground has been advanced to warrant judicial invalidation of the subject rule and that the rule lawfully implements COBRA.

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* Of the United States Court of Appeals for the Federal Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a).

[1] Petitioners filed three, lengthy, separate, main briefs. Many of the arguments were essentially duplicative but were emphasized in one context in one brief and in another context in another. We have attempted to cover each point only once in a cohesive opinion. However, all arguments were taken into consideration in connection with the facet of the case in which it was presented by the various petitioners, as well as where it is expressly discussed in this opinion.

I

Before enactment of COBRA, the Commission, like other agencies, has charged user fees for special benefits rendered to identifiable entities under the Independent Offices Appropriation Act of 1952 ("IOAA"), 31 U.S.C. § 9701 (1982) (*see* 10 C.F.R. pt. 170 (1987)). As established by judicial interpretation, the amount of a fee charged under IOAA is limited to the cost to the agency of a specific benefit rendered to a particular entity. *See, e.g., National Cable Television Ass'n, Inc. v. United States,* 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974); *Federal Power Comm'n v. New England Power Co.,* 415 U.S. 345, 94 S.Ct. 1151, 39 L.Ed.2d 383 (1974). Under IOAA, the Commission has imposed fees for services, for example, for review of a license application or for an inspection, but it has never charged for providing general regulatory services ("generic services"), such as research and rulemaking. The Commission's IOAA fee schedule was judicially approved in *Mississippi Power & Light Co. v. NRC,* 601 F.2d 223 (5th Cir. 1979), *cert. denied,* 444 U.S. 1102, 100 S.Ct. 1066, 62 L.Ed.2d 787 (1980). IOAA is generally applicable to all government agencies.

In 1985, Congress enacted COBRA which contains provisions directing the NRC, *inter alia,* to recoup up to thirty-three percent of its budget through charges imposed on its licensees. More specifically, section 7601(a) of COBRA, to be codified at 42 U.S.C. § 2213, required the Commission, within ninety days after enactment, to evaluate a system to assess and collect annual fees from the Commission's licensees which would "fund all or part of the activities conducted by the Commission," and to provide Congress with a report. Under section 7601(b)(1), the Commission was required, within forty-five days of its report, to impose annual charges on its licensees through rulemaking, subject to three limitations: (1) the aggregate annual fees plus other amounts collected (e.g., under IOAA) "may not exceed" thirty-three percent of the Commission's fiscal year costs, (2) the annual charges must be "reasonably related to the regulatory service provided by the

Commission," and (3) the charges "shall fairly reflect the cost to the Commission of providing such service." [2]

Acting within COBRA's tight deadlines, the Commission timely issued its final "Annual Fee" rule. That rule sets a uniform, annual fee for each power reactor operating licensee ("operating licensee") by calculating the Commission's costs budgeted for certain generic services which it concluded were reasonably related to regulating all licensees in that category. The total of those costs are compared with thirty-three percent of the Commission's budget less fees collected from all licensees under the IOAA. The smaller amount is adopted as the total amount to be recouped. The individual annual charge to each operating licensee is uniform, the total amount to be recouped simply being divided by the number of such licensees. If fees collected under IOAA and COBRA exceed the thirty-three percent ceiling, the rule provides for a refund. A particular licensee can request an exemption under certain circumstances. No COBRA fee is imposed on licensees other than operating licensees, although all licensees continue to pay IOAA fees. The NRC's methodology resulted in a fee of $950,000 per reactor for 1987. 51 Fed.Reg. at 33,231.[3]

The thirty-one petitioners before us are licensees on whom the new fees have been imposed.

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[2] Section 7601(b)(1) of COBRA provides in pertinent part:

> (A) The maximun amount of the aggregate charges assessed pursuant to [COBRA] in any fiscal year may not exceed an amount that, when added to other amounts collected by the Commission for such fiscal year under other provisions of law, is estimated to be equal to 33 percent of the costs incurred by the Commission with respect to such fiscal year; and
>
> (B) any such charge assessed pursuant to this paragraph shall be reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service.

[3] Refunds were made as a result of higher than expected IOAA fees and other adjustments resulting in a fee of $838,000 for 1987. Some full waivers and partial exemptions of the annual fee have been granted for owners of a few, older reactors who might find it in their economic interest to close their reactors rather than pay the fee.

II

Petitioners challenge the Commission's interpretation of the statute, asserting that the standards of section 7601(b)(1) of COBRA do not authorize a uniform annual fee on operating licensees based on the cost of generic services. That challenge has several facets which we address in turn.

A

Petitioners first argue that, while section 7601(b)(1)(B) states only that the user fees charged "shall be reasonably related to the regulatory service provided by the Commission" without specifying the recipient of the "regulatory service" that Congress had in mind, the paragraph cannot reasonably be interpreted to authorize fees except for regulatory services to an identifiable recipient. Per petitioners, the language of COBRA must be interpreted the same as the courts have interpreted the IOAA and other fee statutes: any fee (in contrast to a tax) must relate to a specific benefit bestowed upon a specific beneficiary. *See, e.g., National Cable,* 415 U.S. at 340-41, 94 S.Ct. at 1148-49 (fee, unlike tax, is for benefit to applicant "not shared by other members of society"); *New England Power,* 415 U.S. at 351, 94 S.Ct. at 1155 (charges for regulatory activities of benefit to an entire industry are in the "domain of taxes"). Also, per petitioners, a corollary of this requirement is that fees may not be assessed for activities that do not specifically benefit the feepayer or that serve an independent public interest. *See, e.g., Central & S. Motor Freight Tariff Ass'n v. United States,* 777 F.2d 722, 729-31 (D.C.Cir.1985); *National Ass'n of Broadcasters v. FCC,* 554 F.2d 1118, 1128-29 (D.C.Cir.1976) (invalidating FCC fee schedule because independent public interests were represented in all fees).

In this case, petitioners contend, the equal division of the costs of generic services results not only in one licensee carrying the burden of others who require more general services, but also in the licensees paying for the cost of services which have

an independent public benefit. In the absence of an explicit legislative expression of intent to change generally understood limitations on fee collection, petitioners urge that the statute should be interpreted to preclude the NRC from entering into a "constitutionally unchartered area." Further, petitioners point out that the language of COBRA is sufficiently similar to the provisions of IOAA, except for the explicit direction in IOAA that the fee be based, *inter alia*, on "the value of the service to the recipient," that the COBRA fee authorization should be given the same interpretation.

Having considered petitioners' reasons for urging the application of the IOAA standard, including the constitutional implications in rejection of that standard, we are unpersuaded that Congress intended that COBRA incorporate the same limitations as IOAA. As petitioners acknowledge, noticeably absent from COBRA is the IOAA limitation that the fee reflect "the value of the [agency's] service to the recipient." Further, as the Floor Managers of COBRA made clear, the language was not intended to reiterate IOAA standards:

> The charges assessed pursuant to this authority shall be reasonably related to the regulatory service provided by the Commission and fairly reflect the cost to the Commission of providing such service. This is intended by the conferees to establish a standard separate and distinct from the Commission's existing authority under the Independent Offices Appropriations Act of 1952 in order to permit the Commission to more fully recover the costs associated with regulating various categories of Commission licensees.

132 Cong.Rec. H879 (daily ed. March 6, 1986); 132 Cong.Rec. S2725-6 (daily ed. March 14, 1986) [hereafter cited as "Floor Managers' Report"].[4] Moreover, if the COBRA and IOAA fee standards were the same, COBRA would have been unneces-

[4] The House Energy and Commerce Committee added NRC user fee provisions to proposed budget reconciliation legislation in late 1985. Without floor debate on those provisions, the House passed the legislation. 131

(footnote continues)

sary. The conclusion appears inescapable that Congress did not intend the Commission to apply the IOAA standard, or the case law developed under that standard, when assessing fees under COBRA. Instead, Congress intended the Commission to recover costs of providing services which were not recoverable under IOAA. Indeed, Congress estimated that NRC should recover approximately $80,000,000 per fiscal year over and above IOAA collections. 132 Cong.Rec. H879 (daily ed. Mar. 6, 1986); 132 Cong.Rec. S2725 (daily ed. Mar. 14, 1986).

Under this interpretation, NRC may recover generic costs, that is, costs which do not have a specific, identifiable beneficiary. Moreover, we see no requirement that these generic costs must be reduced by a portion artificially allocated to public benefit, so long as the fees charged are "reasonably related" to services provided the feepayers and do not exact payment for an *independent* public benefit. *See Central & S. Motor Freight*, 777 F.2d at 729. Unlike IOAA, which if read literally gave virtually unlimited discretion to *all* government agencies to recoup the entire amount of an agency's budget "in the public interest," Congress has provided, by the provisions before us, specific direction to a single agency to recover a limited amount of the costs of generic services. With such direction, we conclude that Congress did not intend to require apportionment of generic services between benefit to the public and benefit to the licensees where, as appears here, the two are interdependent or inextricably intertwined.

(footnote continued)

Cong.Rec. H10954 (daily ed. Dec. 5, 1985). The Senate-passed version of the legislation did not even contain NRC user fee provisions, nor was there reported discussion in the Senate of the provisions. After the House-proposed provisions were submitted to the Conference Committee, COBRA issued. Both houses of Congress noted the Conference Report's failure to discuss the NRC user fee provisions; they explained the conferees' silence as an "oversight." 132 Cong.Rec. 14879 (daily ed. Mar. 6, 1986); 132 Cong.Rec. 52725 (daily ed. Mar. 4, 1986). Consequently, a statement by the Floor Managers about the NRC fee provisions was inserted into the Congressional Record.

B

Other arguments against the NRC's interpretation of COBRA are narrower in scope. We are urged to hold, for example, that research, a major item in the cost base used to calculate the annual fee, is not a "regulatory service" within the meaning of section 7601(b)(1)(B). The Commission defends the inclusion of that item on the ground that the included research programs are necessary for the Commission to have continuing confidence that licensed reactors can be operated consistent with the public health and safety and the Commission's regulations. It points to the following statements in NRC's 1986 Annual Report, which describe the NRC's research effort as follows:

> The programs of the Office of Nuclear Regulatory Research (RES) are an essential and integral part of the regulatory process. Safety research supports nuclear regulation by providing defensible technical bases for regulatory action to ensure the protection of public health and safety. NRC research efforts emphasize early identification of potential problems with operating reactors. . . .

4 NRC Ann.Rep. 159 (1987).

Because the fee schedule at issue here is an agency rule based upon the agency's construction of the statute which it administers, the scope of our review is limited. *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel,* 467 U.S. 837, 842, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984). We must uphold the Commission's interpretation that the research included in the base is a "regulatory service," unless it is "arbitrary, capricious, an abuse of discretion, or otherwise contrary to law." *Central & S. Motor Freight,* 777 F.2d at 729. In our judgment the Commission's interpretation passes that test.

Another argument is that the provision in section 7601(b)(1), directing the NRC to "collect annual charges from its licensees," clearly means from *all* of its licensees. The Commission imposed the fee only on one category of licensees,

power reactor operators. It excluded materials licensees, for example, from the coverage of the rule. That exclusion violated COBRA under the petitioners' interpretation.

The statute itself is silent on which licensees are to be charged the annual fee. Congress intended, however, to allow the Commission to recover "costs associated with regulating *various* categories of Commission licensees." Floor Managers, Report, *supra* at 5 (emphasis added). Thus, we see nothing in the statute or legislative history which would deprive the Commission of wide discretion in this matter. The explanation for exclusion of groups other than operating licensees was that the Commission devotes a relatively small amount of resources to their regulation and that the large number of materials licensees, for example, would create administrative difficulties were the commission to calculate an annual fee for them. 51 Fed.Reg. at 24082. We conclude that the Commission's explanation is not arbitrary and, thus, the Commission did not abuse its discretion by failing to impose the annual fee on all licensees.

Petitioners perceive another misconstruction of the statute in the imposition of a *uniform* fee on reactor operators, arguing that the words "reasonably related to the services provided" mean "provided *to each licensee.*" We understand this argument to differ from the principal argument that the IOAA standard applies in that, even if the cost of generic services is included in the base, petitioners maintain, the statute requires apportionment of that cost among the individual licensees. This has been generally presented as a "fairness" argument, i.e., that smaller or less profitable licensees should not be made to shoulder the same burden as larger or more lucrative businesses.[5] We note with strong approval that the Commis-

[5] Contrary to the dissent, the majority does not treat the statutory interpretation argument (*see* II A) as a "fairness" argument.

sion is attempting to develop a revised fee schedule which would provide a range of fees.[8] While the NRC might have reasonably adopted a different fee schedule, the record does not indicate that Congress perceived such basic differences between licensees within a category that the statute precludes a uniform fee. We recall in this context the short time Congress afforded the Commission to frame and promulgate a rule.

Turning to paragraph (A) of section 7601(b)(1), petitioners assert error in the Commission's interpretation of "other amounts collected by the Commission." Such "other amounts" reduce the total amount of fees that may be collected under COBRA. The Commission did not include interest and late fees collected under 31 U.S.C. § 3717 (1982), payments received from other governmental agencies, or fines and penalties collected from the licensees as "other amounts collected." The Commission limited the deduction for "other amounts collected" to the fees it collected under the IOAA.

We find the petitioners' arguments that the additional items are "other amounts collected" unpersuasive. Because the purpose of COBRA was to recover costs incurred by the Commission, the phrase "other amounts collected" can reasonably be interpreted to mean other cost-recovery measures, e.g., the IOAA. Penalties, fines, and interest charges are not cost-recovery measures. Moreover, petitioners' interpretation would allow utilities that violate the law, and pay consequent penalties or fines, to benefit by recovering a portion of the penalty or fine as a reduced user fee. We do not believe Congress intended such a result.

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[8] Commission Chairman Lando W. Zech, Jr., in drafting the Commission's "responses to additional post-hearing questions for Senator Simpson on user fees" and other matters "for inclusion in the Budget hearing record of February 18, 1987," stated:

> The Commission, after further reflection, now recognizes that it would be preferable to base its annual fee on the principle that those licensees who require the greatest expenditure of NRC resources should pay the greatest annual fee. The NRC staff is now developing a proposed rule that would implement this approach.

Letter from Lando W. Zech, Jr. to Sen. Quentin Burdick, Chairman of the Committee on Environment and Public Works (April 10, 1987).

With respect to payments received from other governmental agencies, we reiterate that COBRA's purpose was to generate *additional* federal revenue. If NRC fees were reduced by the amount of reimbursements from other governmental agencies, per petitioners' interpretation of COBRA, the Commission would not achieve that statutory purpose. It is self-evident that a transfer of funds from one agency to another fails to increase federal revenue.

III

Petitioners challenge the validity of the final rule because of alleged violations of the Administrative Procedure Act (APA) § 4, 5 U.S.C. § 553 (1982). The APA requires the Commission to provide notice of its proposed rulemaking adequate to afford "interested parties a reasonable opportunity to participate in the rulemaking process." Such notice must not only give adequate time for comments, but also must provide sufficient factual detail and rationale for the rule to permit interested parties to comment meaningfully. *See, e.g., Connecticut Light & Power Co. v. NRC,* 673 F.2d 525, 530-31 (D.C.Cir.), *cert. denied,* 459 U.S. 835, 103 S.Ct. 79, 74 L.Ed.2d 76 (1982); *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 35 (D.C.Cir.), *cert. denied,* 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977).

On the latter point, petitioners assert that the NRC cost base statement is merely conclusory and that no explanation is given with respect to the criteria used to include or exclude particular items. They point, for example, to the dollar amount of the cost of reactor-related research in the proposed rule and to the reduction, purportedly without explanation, made in that cost figure in the notice promulgating the final rule.

In the final notice the Commission had explained that between the proposed and final rule it had reviewed the research costs "to ensure that only generic costs associated with *all* power reactors, with operating licenses, regardless of type, were included in the cost basis." 51 Fed.Reg. at 33226 (emphasis added). We note also that the lower cost base of the final notice still exceeded thirty-three percent of the NRC budget less

IOAA fees, and, thus, the latter figure was used to limit the collectable fees. *See* 51 Fed.Reg. at 33228. It is essentially irrelevant, therefore, that some costs were removed from the base as long as the remaining costs meet, first, the statutory criteria that they be reasonably related to the regulatory services provided by the NRC and, second, the notice's criteria that the costs be associated with *all* operating licensees. Petitioners do not identify any included programs which do not fall into that category. We conclude that the Commission's explanation was adequate.

Petitioners also argue that the fifteen-day period for comment was too short. On that issue, the Commission notes that Congress gave it only ninety days to report and forty-five more days to enact a final rule. Given Congress' deadline, the Commission maintains that the fifteen days for comment were reasonable.

We find no evidence that petitioners were harmed by the short comment period. The Commission received sixty-one comments, some of them lengthy, addressing its proposed rule. Those comments had a measurable effect on the final rule. Petitioners have had a substantial period of time since publication of the final rule to consider the rule and the supporting data.[7] No substantive challenges which differ in kind from the original comments have been raised. In this instance, the short length of the comment period appears to be no more than a technical argument, which we do not find meritorious. In sum, we conclude that the Commission's rulemaking process did not violate the APA.

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[7] We have considered petitioners' attack on the adequacy of the supporting data and the delay in availability. Given the broad nature of the programs which are included in the base, the data here are adequate. We are unpersuaded that the information was not available in time for meaningful comment. Again, the focus of this attack is, in essence, that a fee based on the costs of generic services is impermissible. Similarly, petitioners' attack on the NRC's methodology in computing the annual fee is largely tied to its argument that fees must be calculated on the basis of identifiable benefits to identifiable, individual recipients.

IV

Having upheld the "Annual Fee" rule on all other asserted grounds, we must necessarily reach the issue of the statute's constitutionality, as interpreted to authorize assessment of fees for generic services. Petitioners argue that, under this construction, the statute constitutes an unconstitutional delegation to the Commission of Congress' power to tax under article I, section 8. If the Commission can require licensees to pay fees for generic, industry-wide services, petitioners argue, then the Commission has in effect been delegated a broad power to levy taxes. In petitioners' view, such a delegation would be unconstitutional on two grounds: (1) the Constitution does not permit Congress to delegate its taxing power, so that any delegation would be unconstitutional, and (2) the delegation here is unconstitutional, in any event, because it constitutes a transfer of power that is unchecked by intelligible standards. We disagree; even if the NRC assessment were characterized a "tax" rather than a "fee," this delegation would meet constitutional limitations.

A

The decisions of the Supreme Court in *National Cable* and *New England Power* lay the foundation for the analysis of the issue raised by petitioners' first ground and must be briefly reviewed. Both involved the IOAA. The IOAA authorized each federal agency to prescribe by regulation a fee for the agency's services,

> taking into consideration the direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts. . . .

National Cable, 415 U.S. at 337, 94 S.Ct. at 1147 (quoting the IOAA of 1952, 31 U.S.C. § 483a, as it read before Title 31 was revised in 1982).

The statement of facts in *National Cable* indicates that the FCC imposed fees upon community antenna television

(CATV) systems, pursuant to the IOAA, for the first time in 1970. CATV outlets, while not licensees of the FCC, had been held subject to some regulation by that agency. *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 88 S.Ct. 1994, 20 L.Ed.2d 1001 (1968). The FCC estimated its direct and indirect costs for CATV regulations and imposed a uniform annual fee to recover that entire amount of its costs from CATV systems, determining that such recovery was "fair and reasonable" and approximated the "value to the recipient" within the meaning of the IOAA.

Focusing on the word "fee" used in IOAA, the majority in *National Cable* discussed the different connotation of that term, as used in the IOAA, from a "tax." The opinion contains the following passage, which has led to much debate:

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. A fee, however, is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. It would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read 31 U.S.C. § 483a narrowly as authorizing not a "tax" but a "fee." A "fee" connotes a "benefit" and the Act by its use of the standard "value to the recipient" carries that connotation. The addition of "public policy or interest served, and other pertinent facts," *if read literally,* carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House.

National Cable, 415 U.S. at 340-41, 94 S.Ct. at 1149 (footnote omitted). In the companion case of *New England Power,* the Supreme Court further distinguished the IOAA-intended "fee" system from a "tax" system, focusing on the "benefit" to an "identifiable recipient" who "asked for" and "received" services from the agency.

Petitioners argue that in these decisions the Supreme Court prohibited any delegation of the power to tax and held that an agency may impose fees (as delimited therein) only for services to individual beneficiaries and not for services that have a general public benefit. The Court so interpreted the IOAA, per petitioners, to avoid a constitutional problem and, indeed, drew a distinction between "fees" and "taxes" of constitutional dimension. The government maintains that *National Cable* and *New England Power* do not fix the constitutional boundary of Congress' power to give an agency authority to impose charges on entities within its regulatory power by a "metaphysical distinction" between "fees" and "taxes."

A close reading of those decisions supports the government's position. The "constitutional problem" actually discussed and avoided by the Court was the delegation of congressional power to agencies without Congress setting standards for their guidance. Specifically, the Court said:

> The Court, speaking through Mr. Chief Justice Hughes said in *Schechter Corp. v. United States,* 295 U.S. 495, 529 [55 S.Ct. 837, 843, 79 L.Ed. 1570]:
>
> > "The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. I, § 1. And the Congress is authorized 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. I, § 8, par. 18. The Congress is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

> Congress, of course, does delegate powers to agencies, setting standards to guide their determination. Thus, in *Hampton & Co. v. United States*, 276 U.S. 394 [48 S.Ct. 348, 72 L.Ed. 624], Congress enacted a flexible tariff law which authorized the imposition of customs duties on articles imported which equaled the difference between the cost of producing them in a foreign country and of selling them here and the cost of producing and selling like or similar articles in the United States. Provision was made for the investigation and determination of these differences by the Tariff Commission which reported to the President who increased or decreased the duty accordingly. The Court in sustaining that system said: "If Congress shall lay down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power." *Id.*, at 409 [48 S.Ct. at 352].
>
> Whether the present Act meets the requirement of *Schechter* and *Hampton* is a question we do not reach. But the hurdles revealed in those decisions lead us to read the Act narrowly to avoid constitutional problems.

National Cable, 415 U.S. at 342, 94 S.Ct. at 1149-50.

The majority opinion in *National Cable* makes no mention of a flat constitutional prohibition against delegation of the tax power. Had there been no dissent, it is unlikely scholars would have launched into the esoteric debate over which powers of Congress can be delegated and which cannot.[8] It is the dissent that interjected the idea that the majority's discussion of constitutional problems turns on a "metaphysical distinction" between taxes and fees. *New England Power*, 415 U.S. at 352, 94 S.Ct. at 1155 (Marshall, J., concurring) (incorporated by

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[8] *Compare* B. Schwartz, *Administrative Law* § 2.10 at 50-51 (2d ed. 1984), *with* 1 K. Davis, *Administrative Law Treatise* § 3:13 at 200 (2d ed. 1978).

reference as dissent to *National Cable,* 415 U.S. at 344, 94 S.Ct. at 1150). While a lower court is not free to depart from a holding of the Supreme Court and will pay close attention even to dicta therein, we know of no principle that requires us to accept the characterization of the majority's holding put forth in a dissent. In some instances the majority may choose to add comments to answer specifically a mischaracterization of its ruling. *See, e.g., Bowen v. Yuckert,* — U.S. —, 107 S.Ct. 2287, 2294 n. 6, 96 L.Ed.2d 119 (1987) ("According to the dissent our opinion implies that the Secretary has unlimited authority to deny meritorious claims.... It hardly needs saying that our opinion carries no such implication."). That choice is, however, simply a matter of judicial style, and a majority's failure to comment cannot be taken as acceptance of a strawman raised by dissent.

Thus, our obligation here is to interpret and apply the majority opinions in *National Cable* and *New England Power.* We read those opinions to hold that the "constitutional problem" mentioned therein was the adequacy of the standards in the delegation. Without the Court's narrow reading of the IOAA, the standards were constitutionally suspect. That interpretation was found, however, to be mandated by the language of the statute and the legislative history, both indicating that the IOAA authorized fees only for specific benefits to specific licensees. Nothing indicates that the interpretation was dictated by a constitutional prohibition against delegation by Congress of the tax power where adequate standards are set for implementation of congressional intent.

One need only briefly review the *Schechter* and *Hampton* decisions, relied upon for the holding in *National Cable,* to conclude that the Court did not hold in *National Cable* that the taxing power could not be delegated. The Court in *Schechter* discussed "limitations of the authority to delegate" and found that a delegation of legislative power, under section 3 of the National Industrial Recovery Act of June 16, 1933, was unconstitutional. Congress had failed to lay down the policies and to establish standards under which such delegation was to be exercised. The Court's citation to *Schechter* in *National Cable*

indicates, therefore, that it was discussing delegations in general without differentiating the taxing power from other powers.

The Court's reliance on *Hampton*, 276 U.S. at 409, 48 S.Ct. at 352, completely negates the gloss petitioners put on the *National Cable* decision. *Hampton* specifically addressed delegation of the tax power. Rather than forbidding such delegation, *Hampton* explicitly sanctioned such delegation at the specific point of reference:

> It is conceded by counsel that Congress may use executive officers in the application and enforcement of a policy declared in law by Congress, and authorize such officers in the application of the Congressional declaration to enforce it by regulation equivalent to law. *But it is said that this never has been permitted to be done where Congress has exercised the power to levy taxes and fix customs duties. The authorities make no such distinction. The same principle that permits Congress to exercise its rate making power in interstate commerce,* by declaring the rule which shall prevail in the legislative fixing of rates, and enables it to remit to a rate-making body created in accordance with its provisions the fixing of such rates, *justifies a similar provision for the fixing of customs duties on imported merchandise.* If Congress shall lay down by legislative act an intelligible principal to which the person or body authorized to fix such rates is directed to conform, such legislative action is not a forbidden delegation of legislative power.

Hampton, 276 U.S. at 409, 48 S.Ct. at 352 (emphasis added).

Nothing said in *National Cable*, or any other Supreme Court case, overrules *Hampton* explicitly or implicitly. Being bound by *Hampton*, we decline petitioners' invitation to join in a debate on the difference between a "fee" and a "tax." While the difference has merit in other contexts, the difference does not rise to the level of making a delegation of taxing power, *per se*, unconstitutional. Thus, we reject petitioners' broad-brush argument and, assuming arguendo that the assessment under

review is a "tax," turn to the question whether Congress has laid "down by legislative act an intelligible principle to which the person or body authorized to fix such rates is directed to conform." *Hampton*, 276 U.S. at 409, 48 S.Ct. at 352.

B

The standard set out in COBRA establishes a legislative policy that NRC collect up to thirty-three percent of its budget from fees "reasonably related to the regulatory service provided by the Commission" and that the fees "fairly reflect the cost to the Commission of providing such service." The burden is, of course, on petitioners to show that these standards are unintelligible. *See, e.g., Yakus v. United States*, 321 U.S. 414, 426, 64 S.Ct. 660, 668, 88 L.Ed. 834 (1944); *Amalgamated Meat Cutters & Butcher Workmen v. Connally*, 337 F.Supp. 737, 746 (D.D.C.1971). We are unpersuaded that petitioners have done so. Petitioners' argument returns again to the IOAA standard, this time to put forth the "specific beneficiary/specific benefit" standard as the minimum guide for assessment of charges. The NRC authorization under COBRA is markedly different from IOAA. To impose the IOAA standard on COBRA would defeat COBRA's purpose.[9] We conclude that the delegation is no less precise, indeed, much more precise than delegations upheld by the Supreme Court. *See, e.g., Lichter v. United States*, 334 U.S. 742, 785-86, 68 S.Ct. 1294, 1316-17, 92 L.Ed. 1694 (1948) (recovery for "excessive profits" earned on war contracts); *American Power & Light Co. v. SEC*, 329 U.S. 90, 97, 67 S.Ct. 133, 138, 91 L.Ed. 103 (1946) (existence of company in holding company system must not "unduly or

[9] The Supreme Court has made it clear that the standards of a delegation of power in a statute are not tested in isolation. Rather, they derive "meaningful content from the purpose of the Act, its factual background and the statutory context." *American Power & Light Co. v. SEC*, 329 U.S. 90, 104, 67 S.Ct. 133, 142, 91 L.Ed. 103 (1946). *See also Lichter v. United States*, 334 U.S. 742, 785, 68 S.Ct. 1294, 1316, 92 L.Ed. 694 (1948); *Fahey v. Mallonee*, 332 U.S. 245, 250-52, 67 S.Ct. 1552, 1554-55, 91 L.Ed. 2030 (1947).

unnecessarily complicate the structure" or "unfairly or inequitably distribute voting power among security holders"); *Yakus v. United States*, 321 U.S. 414, 426, 64 S.Ct. 660, 668, 88 L.Ed. 834 (1944) (maximum prices must be "generally fair and equitable"); *FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 600, 64 S.Ct. 281, 287, 88 L.Ed. 333 (1944) ("just and reasonable rates" for natural gas); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225-26, 63 S.Ct. 997, 1013-14, 87 L.Ed. 1344 (1943) (licensing of radio communications "as public convenience, interest or necessity requires"); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 397, 60 S.Ct. 907, 914, 84 L.Ed. 1263 (1940) (price established for mine must yield a "fair return" on "fair value" of property); *New York Cen. Sec. Corp. v. United States*, 287 U.S. 12, 24, 53 S.Ct. 45, 48, 77 L.Ed 138 (1932) (permitting consolidation of carriers when "in the public interest").

Moreover, it appears that in only two cases in all of our jurisprudence has the congressional delegation to an agency been invalidated on the ground that Congress has delegated power without sufficient standards, specifically, *Schechter* (no standards provided to define when President should exercise delegated power to prohibit transportation of certain oil in interstate commerce, described as a "delegation running riot" in Justice Cardozo's concurrence, 295 U.S. at 553, 55 S.Ct. at 853) and *Panama Ref. Co. v. Ryan*, 293 U.S. 388, 55 S.Ct. 241, 79 L.Ed. 446 (1935) (Congress abdicated its legislative function by giving President virtually unlimited legislative authority over the economic system).

Without defining the limits of the COBRA delegation to the NRC, we conclude that the NRC has exercised its authority within congressional guidelines that provide sufficient standards. The NRC has reasonably limited regulatory services to programs which it concluded, with sufficient explanation, were clearly applicable to all operating licensees. Further, it reasonably limited the charges to those licensees only. We are unpersuaded of error or impermissible arbitrariness in the NRC's implementation of the statutory directive.

V

We have addressed only the arguments raised by petitioners which we found evoked the most serious questions concerning the legality of the NRC's annual user fee rule. A failure to address the nuances of some of petitioners' arguments should not be taken to mean that they were not considered. In sum, we uphold the Commission's 1987 annual user fee rule.

STARR, Circuit Judge, dissenting:

I respectfully dissent. Although both sides stake out rather rigidly extreme positions, the more reasonable, middle ground is that the NRC's decision, albeit reached under difficult time constraints, fails to pass muster under both the first and second steps of the familiar *Chevron* analysis.

I

Petitioners rely on *National Cable Television Association, Inc. v. U.S.*, 415 U.S. 336, 94 S.Ct. 1146, 39 L.Ed.2d 370 (1974) (*"NCTA"*), its companion case *Federal Power Commission v. New England Power Co.*, 415 U.S. 345, 94 S.Ct. 1151, 39 L.Ed.2d 383 (1974), and the series of opinions from this court interpreting those two cases[1] for the proposition that, in order for the NRC fees to be sustained, the fees must be shown (1) to reflect the cost of providing specific benefits to identifiable power reactor licensees and (2) to exclude costs that serve independent public benefits.[2]

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[1] In 1976, this court decided a series of four companion cases providing substantial gloss on the Supreme Court decisions noted in the text: *National Cable Television Ass'n v. FCC*, 554 F.2d 1094, *Electronic Indus. Ass'n v. FCC*, 554 F.2d 1109, *National Ass'n of Broadcasters v. FCC*, 554 F.2d 1118, *Capital Cities Communications, Inc. v. FCC*, 554 F.2d 1135.

[2] *See, e.g.*, APL Brief at 19 ("In order to be sustained by this Court, the annual user fees that the NRC adopted pursuant to COBRA must be shown to reflect the cost to the government of providing specific benefits to identifiable power reactor licensees, and exclude costs that serve independent public benefits.").

Petitioners make, in essence, two arguments for applying these criteria to the NRC fees at issue. First, they argue that *NCTA* and its progeny draw a distinction between "fees," which agencies may assess (subject to the limitations developed in the decisional law), and "taxes," which can be assessed only by Congress. Since the power to tax cannot be delegated to an administrative agency, the argument runs, Congress must have intended to authorize only a fee, which is therefore subject to the two criteria listed above.[3] Second, petitioners argue that the language of COBRA tracks the language of both the IOAA and cases construing the latter statute. From this, petitioners conclude that Congress intended the criteria developed in that body of law to apply to COBRA. In petitioners' view, the fee schedule must be invalidated and the assessments refunded, because the NRC did not apply these criteria in arriving at its fee assessments in the instant case.

NRC, not surprisingly, is of a decidedly different perspective. The Commission contends that the *NCTA* line of cases is irrelevant to COBRA's provisions. Under COBRA, the applicable statutory standard requires only that the NRC impose charges that "reasonably relate[ ] to the regulatory services" it provides and that those charges "fairly reflect the cost . . . of providing" such services. Since it has calculated the annual charge in accordance with those standards, NRC maintains, its assessment under the auspices of COBRA, should be sustained.

These, then, are the competing positions. Both, as I indicated at the outset, seem rather extreme. If as petitioners argue, Congress intended the same criteria for fee assessments developed under the IOAA to apply here, then enactment of COBRA would have been but a hollow exercise. Clearly, Congress intended NRC to go beyond the impositions of fees

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[3] Alternatively, petitioners argue that if Congress can delegate its taxing power, it must provide intelligible standards to guide agency discretion. Since Congress failed to provide such standards in this instance, the argument runs, Congress could not have intended a delegation of taxing authority—or if it did, the attempted delegation is invalid.

already assessable under IOAA. *See* FPL Brief at 28; maj. op. at 769. Nor can petitioners successfully argue that the *NCTA* line of cases (or indeed, *NCTA* itself) stakes out the outer limits of Congress' power to delegate assessment authority. The specific criteria enunciated in those cases were developed in the context of construing a particular statute (the IOAA). The standards enumerated in *Central & S. Motor Freight Tariff Ass'n v. ICC*, 777 F.2d 722 (D.C.Cir. 1985), for example, are certainly not, as I understand them, of constitutional dimension.[4]

I thus agree with my colleagues that "Congress [did not] intend[ ] that COBRA incorporate the same limitations as IOAA." Maj. op. at 768. I also agree that COBRA was intended to authorize the NRC to recover *generic* costs, such as those for research and rulemaking. Maj. op. at 769.[5]

On the other hand, NRC's sweeping interpretation of COBRA is also extreme, as the Commission itself recognizes. From NRC's calculation of the annual charge, it is apparent

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[4] *Central & S. Motor Freight Tariff Ass'n* is the most recent word in this circuit on the criteria to which an administrative agency must adhere in assessing fees under the IOAA. There, the court enumerated five criteria that fee assessments must meet under the IOAA:

> (1) the agency must identify the specific agency activity or activities for which the fee is being assessed;
> (2) the service must produce a special, private benefit;
> (3) the value of that private benefit must be reasonably related to the fee;
> (4) the benefit must accrue at least in part to an identifiable private beneficiary and not merely to the industry as a whole; and
> (5) the service in question must produce no independent public benefit.

777 F.2d at 730.

[5] COBRA was enacted against a backdrop of decisional law that definitively constrained fees levied under the authority of IOAA. Under that law, the NRC could not recover, for example, research and rulemaking costs. *See, e.g., Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n*, 601 F.2d 223 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102, 100 S.Ct. 1066, 62 L.Ed.2d 787 (1980). COBRA, it seems to me, was designed to break out of those constraints on IOAA fee assessment.

that the agency interprets the requirement that the fee be "reasonably related to the regulatory service provided" in a manner that reads out *any* requirement that the service provide *specific* benefits to *identifiable* beneficiaries. NRC makes no benefit-side calculation whatsoever, other than the hopelessly general determination that all services that form the basis for its *cost* calculations benefit the *entire* class of holders of power reactor operating licensees to a greater or lesser extent. NRC makes no attempt to allocate specific benefits to identifiable beneficiaries; nor does the Commission explain why a per capita assessment best makes any such allocation.

The only virtue of NRC's method of calculating the annual fees is its Spartan simplicity. In what Doestoevsky would doubtless characterize as an act of bureaucratic passion, the agency in classic Washington fashion aggregated all portions of the NRC's budget that benefited all power reactor licensees as a class; that amount was then divided among all reactor licensees. NRC made no attempt to show that its expenditures reflect the same costs or the same benefits for each nuclear power reactor. Not only did the $950,000 annual fee apply to every power reactor licensee, without regard to whether (or to what extent) the licensee seeks the services of the Commission during the course of the year, but it likewise did not vary with any burden that the individual licensee places on the Commission.

NRC's studied inattention to the "benefits" calculation represents a dramatic break with IOAA methodology, a cleavage unsupported by the limiting language that Congress fashioned in COBRA. And therein lies the rub; COBRA, in my reading of it, mandates that NRC consider this side of the calculation.

First, COBRA authorizes the NRC to collect fees only for a "regulatory service provided." Whatever its precise meaning, this phrase, fairly read, conveys the need for some sort of "benefits" calculation. It requires the agency to make some assessment of which (and how much) licensees are benefitted by its "regulatory services." In broadly defining the basis for NRC's assessments, Congress must have meant for the NRC to take an expansive approach, one that would capture generic

regulatory services. *See supra* p. 777. To this extent, I am in happy accord with my colleagues. But at the same time, I cannot agree that Congress meant that anything goes. This language, rather, is meant to require the NRC to weigh the benefits of its regulatory services to set fees for licensees in a fashion that takes those benefits into account.

Second, in enacting COBRA, Congress was not writing on a blank slate. It was legislating against the backdrop of a well-established body of judicial decisions construing fee statutes in general and the IOAA in particular. In adopting terms such as "regulatory service provided" and "reasonably related," Congress can reasonably be assumed to have adopted at least some of the gloss placed on those terms through the decisional law.[6] Our decisions under the IOAA have frequently referred to fee recovery for *services* provided by regulatory agencies, and we have often employed the phrase "reasonably related" to articulate the relationship that must obtain between costs to the regulator and benefits to the regulated. *See National Cable Television Ass'n v. FCC,* 554 F.2d 1094, 1106-07 (D.C.Cir.1976); *Electronic Indus. Ass'n v. FCC,* 554 F.2d 1109, 1114-15 (D.C.Cir.1976); *National Ass'n of Broadcasters v. FCC,* 554 F.2d 1118, 1133 (D.C.Cir.1976); *Capital Cities Communications, Inc. v. FCC,* 554 F.2d 1135, 1138 (D.C.Cir. 1976).[7]

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[6] *See, e.g., Blitz v. Donovan,* 740 F.2d 1241, 1245 (D.C.Cir.1984) (Tamm, J.):

> In construing statutes, the Supreme Court has found it "always appropriate to assume that our elected representatives . . . know the law. . . ." *Cannon v. University of Chicago,* 441 U.S. 677, 696-97 [99 S.Ct. 1946, 1957-58, 60 L.Ed.2d 560]. Furthermore, "Congress is deemed to know the . . . judicial gloss given to certain language and thus adopts the existing interpretation unless it affirmatively acts to change the meaning." *Florida National Guard v. FLRA,* 699 F.2d 1082, 1087 (11th Cir.), *cert. denied,* 464 U.S. 1007 [104 S.Ct. 524, 78 L.Ed.2d 708] (1983).

See also 2A Sutherland, Statutory Construction § 49.09 at 400 (4th ed. 1984).

[7] The NRC argues that construction of the word "fee" as used in COBRA should not be controlled by cases construing the IOAA. (As I have already stated, with that much I agree. But this is not to say that the decisional law under the IOAA is entirely irrelevant to determining what

(footnote continues)

Third, although admittedly of highly limited relevance because of its post-enactment status,[8] Senator Simpson, one of the Senate managers of COBRA, explained after the bill's passage that "[COBRA] requires the Commission to demonstrate on a *licensee-specific basis* that the fee to be assessed is reasonably related to the actual cost of the regulatory service provided. . . ." 132 Cong.Rec. S16,964 (daily ed. Oct. 17, 1986)

(footnote continued)

Congress meant by terms, such as "regulatory service," that seem inherently to be terms of art.) Instead, the NRC cites us to a very different judicial gloss of the word "fee" found in the context of intergovernmental tax immunity. *See* NRC Brief at 40 n. 29. There, the NRC suggests, "where the distinction between a fee and a tax is all-important, the Courts have applied a different standard for fees, one much closer to that embodied in COBRA than the IOAA standard." *Id.* But the Supreme Court case to which the NRC cites us, *Massachusetts v. United States,* 435 U.S. 444, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978), lays down a three-pronged test that includes as one of its elements the requirement that a fee be "based on a fair approximation of use of the system." *Id.* at 466-67, 98 S.Ct. at 1166-67. That part of the analysis is, as we have seen, lacking in the interpretation that the NRC now defends before us.

Thus, the requirement that fees be tied to specific benefits is a requirement of fee statutes generally; it is not an IOAA idiosyncracy. Indeed, I am aware of no case (and we are cited to none) interpreting a fee statute in which the requirement of a nexus between costs and benefits has not been imposed. *See, e.g., In re Jenny Lynn Mining Co.,* 780 F.2d 585 (6th Cir.), *cert. denied,* 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 (1986); *City of Vanceburg v. FERC,* 571 F.2d 630 (D.C.Cir.1977), *cert. denied,* 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 108 (1978); *see also* Gillette & Hopkins, *Federal User Fees; A Legal and Economic Analysis,* 67 BOSTON U.L.REV. 795, 843 (1987) ("Insofar as authorizations such as those conferred on the NRC disavow any linkage to particular benefits . . . any relationship between fees imposed and appropriate levels of services provided may be wholly coincidental. The user fee in this situation becomes largely a revenue-raising device imposed on particular recipients of government services. Such a device, although denominated a charge or user fee, is in essence a redistributional tax.").

Metaphysical arguments as to the distinction between a tax and a fee aside, it is critically important *as a matter of statutory interpretation* that Congress chose to enact a user fee (rather than purport to delegate authority to tax).

[8] The Supreme Court has warned time and again about the manifest dangers of resorting to legislative history. (Perhaps most noteworthy of late are recent Court opinions authored by Justices Marshall and Scalia suggesting the *irrelevance* of legislative history. *See Burlington N. R.R. v. Oklahoma Tax Comm.,* — U.S. —, 107 S.Ct. 1855, 1860, 95 L.Ed.2d 404 (1987); *United Sav. Ass'n v. Timbers of Inwood Forest Assocs., Ltd.,* — U.S. —, 108 S.Ct. 626,

(footnote continues)

(emphasis added). Indeed, Senator Simpson was vociferously critical of the Commission's handling of the per capita fee assessment:

> [B]y adopting a flat annual fee for all nuclear power reactors—other than those not authorized to operate—regardless of the variance in the regulatory service that would be provided to each individual licensee and the corresponding variance in the cost of providing such service—the Commission has *virtually disregarded the directive contained in* [*COBRA*]. Indeed, the "back calculation" that the Commission has undertaken in order to reach this flat fee . . . is about as far from what was contemplated under [COBRA] as I can possibly imagine. If the fee reached through this bizarre calculation has any relation to the actual regulatory costs for individual licensees, it is only by coincidence, Mr. President—and certainly it is not the kind of determination that I think that Congress had in mind when it enacted [COBRA].

132 Cong.Rec. S16963 (daily ed. Oct. 17, 1986) (emphasis added).

Finally, it cannot reasonably be thought that the Commission is somehow unable to attend to the benefit side of the

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(footnote continued)

634, 98 L.Ed.2d 740 (1988).) And those dangers are, of course, at their height when repair is had to post-enactment statements by legislators.

Without abandoning those well-established concerns, I note by way of modest defense of my invocation of Senator Simpson's statements that Congress has of late been passing smorgasbord measures of distinctly substantive bite in omnibus pieces of appropriations legislation. After the dust settles, questions then have to be sorted out, sometimes in court. The recent action of the political branches with respect to the future of the ownership of the Boston Herald provides an instructive case in point. It may well be, then, that if legislative history is to be used (inconsistently with the sound practice of our English counterparts), then the courts should not close their eyes to what may well be, in practical terms, the *only* legislative history available if Congress proceeds to conduct its business in accord with more recent procedural innovations.

equation. NRC's recent efforts to link more closely regulatory costs incurred to benefits received by individual licensees belie any "impossibility" defense. In response to an inquiry from the Committee on Environment and Public Works, the NRC Chairman wrote:

> The Commission believes that it can develop a revised [fee rule under COBRA] that provides for tying fees more closely to the costs of providing *specific* services rendered to specific licensees.... The Commission, after further reflection, now recognizes that it would be preferable to base its annual fee on the principle that those licensees who require the greatest expenditure of NRC resources should pay the greatest annual fee.

Letter of Apr. 10, 1987, WEP Brief, Appendix C, Question 12.[9]

In sum, traditional tools of statutory construction lead me to conclude that, in the absence of indications to the contrary, Congress could not reasonably have intended to work such a complete break from judicial decisions interpreting the pivotal terms that Congress deliberately employed. Although Congress intended to go beyond the IOAA, it just cannot be that the Article I branch meant to permit the Commission to take such grossly nontailored action.

II

But there is another, and highly fundamental, reason for insisting that the agency move more cautiously than it did in interpreting COBRA. Whatever the boundaries of the constitutional limits on Congress' ability to delegate its taxing power, the fact that a constitutional issue looms menacingly in

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[9] Like my colleagues, I sympathize with the short time within which the NRC was required to promulgate its rule, maj. op. at 770. As NRC Chairman Zech said with respect to the proposed rule, it was "the best the staff can do at this time." 51 Fed.Reg. at 24,087; J.A. 401. Nonetheless, those constraints are insufficient to justify adoption of a rule that is contrary to law. And, with the inestimable benefit of hindsight, we now know that the agency can do better.

the background counsels in favor of a narrower construction of COBRA than that embraced by the Commission.[10] As the FPL petitioners aptly put it, "it is . . . wholly inappropriate to assume that, without having made its intention express, Congress empowered the NRC to enter into what, at best, must be regarded as a constitutionally unchartered area." FPL Brief at 26.

Fortunately, there are some familiar markers to assist us in finding our way. The identical situation confronted the Court in *NCTA* when it first addressed the IOAA. In that case, the Supreme Court supplied a narrowing construction in order to avoid constitutional problems arising out of the lack of intelligible standards contained in the text of the Act itself.[11]

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[10] The Commission itself expressed doubts about the constitutionality of COBRA. In its July 1986 report to Congress, the Commission stated:

> [A]dditional clarifying legislation should be proposed because the standards set forth in [COBRA] are unclear. . . . Because it appears that the lack of clear statutory language that definitively distinguishes [COBRA] from the IOAA, the legal problems identified by the Supreme Court in distinguishing the IOAA fees from taxes may be also present in [COBRA].

Accordingly, the Commission recommends that the Congress enact clarifying legislation. . . .

J.A. at 445.

When Congress then turned a deaf ear to the Commission's entreaties, the NRC responded by, in effect, throwing up its hands and leaving it to the courts to strike down the regulations.

[11] *See also Industrial Union Department, AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 100 S.Ct. 2844, 65 L.Ed.2d 1010 (1980) (adopting a narrowing construction in the course of holding invalid the agency's promulgation of standards); L. TRIBE, AMERICAN CONSTITUTIONAL LAW, § 5-17 at 366 n. 15 (1988):

> Exercises of general taxing power are, as a practical matter, not susceptible to ordinary methods of judicial review. *See generally Ely, Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1235 (1970). The same discretionary character of taxation that ordinarily shields it from effective judicial review would also make legislative oversight of a delegate difficult. Therefore, it seems likely that the taxation power, if it is to be exercised legitimately, may be exercised only by Congress itself.

The difficult question in such cases is where to draw the lines. If Congress had enacted a statute directing the NRC to collect fees up to the constitutional limits of its authority, then we would be forced to define those limits. But that is not what Congress enacted; rather, as I have already tried to show, Congress saw fit to enact a statute expressly containing (by reference to decisional law under the IOAA) limiting language. In particular, Congress' use of a two-pronged articulation of the standard is interpretively significant. It suggests that Congress meant for the NRC, in making its assessment calculation, to weigh both benefit to the regulated entity and cost to the NRC. NRC's self-confessed inattention to the benefit side of the equation is fatal to its interpretation.[12]

Once again, I am not suggesting that COBRA incorporates precisely the standards of the IOAA.[13] Nor am I suggesting that scientific precision is required. To the contrary, a fair approxi-

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[12] Indeed, the court's treatment of the benefit analysis is troubling in another way as well. The court holds that there is "no requirement that these generic costs must be reduced by a portion artifically allocated to public benefit, so long as the fees charged are 'reasonably related' to services provided the feepayers and do not exact payment for an *independent* public benefit. *See Central & S. Motor Freight*, 777 F.2d at 729." Maj. op. at 769-770 (emphasis in original). But there is nothing in the record to indicate that the agency made *any* effort to isolate fees that amounted to a payment for an independent public benefit.

[13] APL interprets our cases under the IOAA to adopt the following rule for analyzing the benefit conferred on the utility:

> The NRC's annual fee is improper if it is not a "reasonable approximation" of costs to provide special benefits to individual recipients, and is invalid to the extent the NRC's fee "unreasonably exceeds the value of the special services for which it is charged." *NCTA II*, 554 F.2d at 1106. The fee is also improper unless it is equivalent, "or at least proportionate to," the value of the benefit conferred, *City of Vanceburg v. FERC*, 571 F.2d 630, 643 (D.C. Cir.1977), *cert. denied*, 439 U.S. 818, 99 S.Ct. 79, 58 L.Ed.2d 108 (1978); the fee must be reasonably related to the individual costs of services and to the total costs for particular segments of recipients. *NCTA UU*, 554 F.2d at 1108.

APL Brief at 31.

mation of the benefit inuring to the licensee would have sufficed.[14]

NRC has done nothing in this respect. It has failed entirely to seek to allocate among the various individual recipients the costs of regulation that it seeks to recover through COBRA, or to explain why it cannot make such an allocation. The Commission failed to consider any of a number of methods by which it might have drawn a closer fit between benefit and burden. By way of modest suggestion, these include (1) basing the annual fee upon the level of a licensee's fee assessments under the IOAA as an approximation of that licensee's use of regulatory services; or (2) basing the fee upon the amount of time spent by the NRC on each licensee or the number of regulatory matters pending. *See* WEP Brief at 35, 43.[15]

In failing to consider such linkages, the NRC effectively reads out of the statute standards requiring its fees to be "reasonably related" to "regulatory services provided." It is

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[14] The Court characterizes petitioners' contention that there must be a nexus between fees charged and benefits received as a " 'fairness' argument" and notes with strong approval Commission attempts to revise the fee schedule. Maj. op. at 770. Similarly Commissioner Zech, in his statement of separate views published with the Notice of Proposed Rulemaking, urged the Commission to "move toward an annual charge which would take into account, first, the amount of electricity produced by each licensee and, second, the resources which are expended by the Commission which fairly reflect the cost to the Commission of providing inspection and other services to the licensee." 51 Fed.Reg. 24078, 24087 (Jul. 1, 1986); J.A. at 401. What my colleagues and Commissioner Zech characterize as a matter of "fairness" or "sound policy," however, I believe is statutorily mandated.

[15] NRC protests that it duly considered and rejected in reasoned fashion comments suggesting that the fee should be based on the power rating in thermal megawatts for each reactor. But the NRC's response to that suggestion was strictly in terms of *cost* to the NRC and the ability of licensees to pay; there was no analysis with respect to the *benefit* to licensees. J.A. at 702.

In choosing the per capita approach rather than the megawatt approach in its initial Notice of Proposed Rulemaking, the Commission stated that "the Commission has selected [the per capita approach] for the proposed rule because there is no clear correlation between reactor size and NRC regulatory costs." J.A. at 397.

singularly unlikely that each licensee—regardless of differences in demand for regulatory services, plant size, plant age and other factors—derives roughly the same benefits as every other licensee.[16] But that remarkable, egalitarianism-with-a-vengeance perspective is precisely the assumption undergirding the NRC's fee regime. The agency's statutory interpretation thus lacks the "reasoned explanation" required by *Rettig v. Pension Benefit Guaranty Corp.*, 744 F.2d 133, 151 (D.C.Cir.1984) ("a reviewing court must determine both whether the interpretation is arguably consistent with the underlying statutory scheme in a substantive sense and whether "the agency considered the matter in a detailed and reasoned fashion" (citing *Chevron*, 467 U.S. at 865, 104 S.Ct. at 2793)). *See also Continental Air Lines v. Department of Transportation*, 843 F.2d 1444, 1451-1453 (D.C.Cir.1988) (discussing the application of a "reasoned decisionmaking" requirement to agencies' statutory interpretations).

Thus constrained to conclude that the NRC's interpretation of the statute was unreasonable within the meaning of *Chevron* and its progeny, I would grant the petition for review.

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[16] In 1985, the 90 nuclear power reactors in the United States ranged in size from 165 to 3,833 thermal megawatts. Inspection, licensing, and individual operator fees for these reactors ranged from $27,997 to $523,172. J.A. at 643-46.

APPENDIX B

NUCLEAR REGULATORY COMMISSION

10 CFR Parts 51 and 171

Annual Fee for Power Reactor Operating Licenses and Conforming Amendment

AGENCY: Nuclear Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Nuclear Regulatory Commission is adding to its regulations a new regulation that will impose an annual fee on power reactors with operating licenses. This annual fee will recover allowable NRC budgeted costs for providing regulatory services to power reactors with operating licenses and will not alter the existing fee schedule under 10 CFR Part 170. The annual fee is necessary to comply with the statutory mandate of the Consolidated Omnibus Budget Reconciliation Act of 1985.

EFFECTIVE DATE: October 20, 1986.

FOR FURTHER INFORMATION CONTACT: Robert L. Fonner, Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: 301-492-8692.

SUPPLEMENTARY INFORMATION:

Contents

I. Background

A. Authority for the Rule

The Consolidated Omnibus Budget Reconciliation Act (COBRA) of 1985 (Pub. L. 99-272, 1986) requires the Nuclear Regulatory Commission to assess and collect annual charges from persons licensed by the Commission pursuant to the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) in an amount to approximate 33 percent of the Commission's estimated budget.

Section 7601 of the Budget Reconciliation Act states that the charges assessed shall be established by rule and, specifically, in paragraph (b)(1) that:

> * * * the Nuclear Regulatory Commission shall assess and collect annual charges from its licensees on a fiscal year basis, except that—
>
> (A) the maximum amount of the aggregate charges assessed pursuant to this paragraph in any fiscal year may not exceed an amount that, when added to other amounts collected by the Commission for such fiscal year under other provisions of law, is estimated to be equal to 33 percent of the costs incurred by the Commission with respect to such fiscal year; and
>
> (B) any such charge assessed pursuant to this paragraph shall be reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service.

The legislative history shows that Congress intended the authority of this mandate to go beyond that contained in the Independent Offices Appropriation Act (IOAA) of 1952 (65 Stat. 290; 31 U.S.C. 9701). The Congressional Managers of COBRA, in describing this legislative provision, asserted:

> The charges assessed pursuant to this authority shall be reasonably related to the regulatory service provided by the Commission and fairly reflect the cost to the Commission of providing such service. This is intended by the conferees to establish a standard separate and distinct from the Commission's existing authority under the Independent Offices Appropriation Act of 1952 in order to permit the Commission to more

fully recover the costs associated with regulating various categories of Commission licensees.

See 132 Cong. Rec. H879 (Daily Ed. March 6, 1986); 132 Cong. Rec. S2725 (Daily Ed. March 14, 1986).

The NRC is construing this legislation to permit it to charge licensees not only for special benefits provided to individual licensees, as that term has been used in construing the IOAA, but also to recover the cost of any Commission activity reasonably related to regulating power reactors licensed to operate.

B. Revisions and Effect on Existing Fee Schedule

The proposed rule (July 1, 1986; 51 FR 24078) provided that applicants for power reactor operating licenses or holders of power reactor operating licenses and major material licensees would pay an annual fee in lieu of all other fees.

The final rule will impose an annual fee on power reactors with operating licenses. The annual fee under 10 CFR Part 171 will be based on NRC budgeted costs for providing the following regulatory services to power reactors with operating licenses: (1) Research activities directly related to the regulation of power reactors on a generic basis, (2) power reactor plant regulation (except licensing and inspection activities, and Part 55 operator licensing and instructor certification), and (3) safeguards activities for power reactors (other than those activities directly associated with plant-specific licensing and amendments). This fee will include cost for many operating reactor-related regulatory costs not recovered under NRC's existing fee schedule. 10 CFR Part 170 (49 FR 21293; May 21, 1984), which established fees for some regulatory services that NRC provides its licensees.

The proposed rule provided that Part 170 would be suspended and, therefore, no fees would be collected under the IOAA. This proposal also relieved small materials licensees of all fees. The final rule provides that Part 171 will not affect the existing 10 CFR Part 170 fee schedule. This means that all fees currently collected under 10 CFR Part 170 will continue to be collected, including those from small materials licensees. Thus,

under the final rule, holders of power reactor operating licenses will pay an annual charge (COBRA) under Part 171 and IOAA fees under Part 170. Other applicants and licensees will pay fees only under Part 170.

The Commission has placed in its Public Document Room at 1717 H. Street, NW., Washington, D.C., data used in developing the proposed 10 CFR Part 171, copies of the comments received, and a separate document that categorizes and summarizes these comments by facilities, Agreement States, and materials licensees.

II. Summary of Comments

Only three commenters supported the proposed rule; the majority of the sixty-one comments discussed eleven common concerns:

1. Constitutionality of the Annual Fee
2. Exclusion of Some Licenses from Fees
3. Collection of One-Third of the NRC Budget
4. Inclusion of Research Costs in Fee Base
5. Fines, Penalties, Interest, and Reimbursements
6. Basing the Fee on Size of Reactor
7. High-Level Waste Fund
8. Exemption Provision
9. Quarterly Assessments
10. Adjustments
11. Comment Period

Twelve commenters thought the proposed fees to be unconstitutional, and four commenters said no annual fees should be assessed to recover NRC costs for providing regulatory services, but, rather that the public, as the real beneficiary of NRC regulatory services, should support the regulatory costs of the NRC. Thirty-four commenters, in opposition to the proposed rule, requested that small materials licenses be subject to fees charged by the NRC.

Two commenters stated that relief should be given from the proposed fees for uranium mills licenses. One commenter thought that suspended license applications, with minimal

activity, should not be subject to the proposed annual fee because the fee would be disproportionately large in relation to the profit realized in that circumstance. One commenter also thought that operating license (OL) applicants would not be receiving a benefit from the activities upon which the proposed fee was based and would, in effect, have a double fee burden because they would pay the annual fee in addition to fees previously paid under Part 170. One commenter asserted that "Architect-Engineers, vendors, test reactors, waste repositories and others . . ." should pay annual fees.

Several commenters expressed the view that the NRC was not required to collect a full 33 percent of its budget. Eleven commenters held the view that agency research costs should not be included in the cost basis for determining the annual fee. Two commenters asserted that fines, interest, and penalties should be included in the cost basis for the proposed fees. Ten commenters thought the annual fee should be assessed on the basis of power rating in thermal megawatts (one commenter opposed this suggestion). One commenter thought that the Department of Energy high-level waste program fund should be subject to fees. One commenter said that an exemption provision was needed for small and expensive-to-operate reactors because of the disproportionate burden that the proposed rule would impose on the resources generated from these reactors. Six commenters thought that fees should be collected on a quarterly or a monthly basis. Commenters urged that should excess fees be collected, a provision for refunds be included in the rule. Finally, several commenters thought that the comment period for the proposed rule was too short.

No comments were received regarding the proposed amendment to 10 CFR Part 51, which provides that promulgation of Part 171, and future amendments thereto, does not require preparation of an environmental impact statement or assessment.

III. Resolution of Comments

1. Constitutionality of the Annual Fee

Comment: Many of the commenters argued that the Commission was imposing an unconstitutional tax.

Response: The thrust of commenters' arguments was that the Commission's proposal violated constraints on user fees established by the Supreme Court in *National Cable Television v. United States,* 415 U.S. 336 (1974) and *Federal Power Commission v. New England Power,* 415 U.S. 345 (1974) and further developed in subsequent decisions by courts of appeals. In *National Cable* and *New England Power,* the Supreme Court examined agency authority to assess fees pursuant to a particular statute, the Independent Officers Appropriation Act of 1952. The Court there adopted a limiting construction of the IOAA to avoid a Constitutional question of whether certain language of the IOAA amounted to a delegation to assess "taxes" rather then "fees." The Court indicated that the legislative history of the IOAA did not reveal an intention on the part of Congress to delegate its taxing authority to Federal agencies. In short, the Court's analysis was largely limited to the IOAA itself. The commenters, however, appear to read these cases as establishing general Constitutional limitations on an agency's power to assess fees. Accordingly, many of the commenters argued that because the NRC was not only charging for "special benefits" provided to identifiable recipients of NRC services, but also recovering the costs of its generic rulemaking and research activities, the NRC was imposing an unconstitutional tax.

The Commission finds these legal arguments to be unpersuasive. The commenters' arguments are based on the faulty premise that the only legally acceptable standard for assessing fees is that contained in the IOAA. In Section 7601(b)(B) of COBRA, Congress provided that annual charges assessed by the NRC "... shall be reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service." The underlying legislative history makes clear that this provision is

intended by the conferees to establish a standard separate and distinct from the Commission's existing authority under IOAA in order to permit the Commission to more fully recover the costs associated with regulating various categories of Commission licensees. Statement of Managers Re NRC Fees, 132 Cong. Rec. H. 879 (Daily Ed. March 6, 1986); 132 Cong. Rec. S. 2725 (Daily Ed. March 14, 1986). Congress undeniably has the authority to provide a fee standard distinct from the IOAA, provided that the standard satisfies Constitutional requirements.

In numerous cases the Supreme Court has addressed the issue of whether Congress has unconstitutionally delegated legislative power to administrative agencies. A reading of those cases indicates that Congress may delegate its authority to administrative agencies provided that it sets forth intelligible standards for the agency to follow in carrying out the Congressionally prescribed policy. *Hampton, Jr. & Co. v. United States,* 276 U.S. 394 (1928). A delegation is not unconstitutional simply because the determination of facts and the inferences to be drawn from them in light of the statutory standards and declaration of policy call for the exercise of judgment and for the formulation of subsidiary administrative policy within the prescribed statutory framework. *Yakus v. United States,* 321 U.S. 414, 425 (1944).

In COBRA, Congress has laid down an intelligible standard for the Commission to apply and has articulated its policy objectives. Simply put, the NRC is to recover approximately 33 percent of its budget from user fees (see Statement of Managers Re NRC Fees) and is to assess fees based on the standard articulated above. We believe this delegation of authority to the NRC satisfies all Constitutional requirements.

The courts have previously considered the issue of whether a fee can be charged for a service provided by the Government that benefits not only the licensee, but also the general public. The Courts have held that the mutual benefit of a Government service to the recipient and to the public is not a legal bar to the imposition of fees. Prorating of costs on the basis of benefit to the public is not required. *Mississippi Power & Light Co. v. U.S.*

Nuclear Regulatory Commission, 601 F.2d 223 (1979), *cert. denied* 444 U.S. 1102 (1980).

Thus the only question that remains is whether the fee schedule promulgated by the NRC falls within the parameters authorized by Congress. We believe that it clearly does. Following the Congressional mandate, we are attempting to collect a third of our budget in fees and, as explained elsewhere in this notice, have carefully developed a schedule which ensures that fees assessed are reasonably related to the NRC costs of providing regulatory services.

2. Exclusion of Some Licenses From Fees

Comment: Agreement States and some other commenters asserted that the proposed rule, in eliminating fees for small materials licensees, would have a severe adverse effect on State fee programs and that 10 CFR Part 170 should be retained in order to maintain reasonable fees for materials licensees.

Many commenters asserted that the Commission had misconstrued Congressional intent by proposing the suspension of collections under the IOAA—the authority for the current Part 170. Commenters argued that the Congress contemplated that the NRC would continue to collect fees under the IOAA, as well as COBRA. Specifically, many commenters vigorously argued that Congress contemplated that all licensees should pay fees and that the NRC lacked authority to exempt all small materials licenses from payment of fees.

Response: The Commission believes it did not misread the Congressional intent, and that it has the authority under COBRA to suspend collections under Part 170 and not charge fees to small materials licensees. The Commission, nonetheless, has decided to retain Part 170 as a means of more equitably distributing the agency costs among those receiving services.

The final rule will not affect materials licensees; they will continue to pay only fees chargeable under part 170. Major materials licensees will not be subject to an annual fee, as previously proposed. OL applicants similarly will remain subject only to fees under Part 170. With the issuance of an

operating license, a former OL applicant will be subject to the annual fee required under this final rule in addition to the other fees collected for services covered by Part 170. If an OL applicant receives its OL license during the year, it will pay only a prorated annual fee for that year, because, under the final rule, Part 170 will remain in effect, and fees will be collected under Part 170 up to the time of issuance of the OL. The applicants for licenses and holders of these licenses for test and research reactors and waste repositories will also continue to pay fees under that part. Vendors will also continue to pay fees under Part 170.

3. Collection of One-Third of the NRC Budget

Comment: The Commission is not required by Section 7601 of the COBRA to collect the full 33 percent of its budget.

Response: The Budget Reconciliation Act provides that the "maximum amount of the aggregate charges assessed may not exceed an amount that . . . is estimated to be equal to 33 percent of the costs incurred by the Commission with respect to such fiscal year. . . ." On its face, this is a ceiling, i.e., it would permit the Commission to charge user fees of less than 33 percent. However, the legislative history clearly indicates that Congress expected the NRC to charge the full amount authorized by the statute. The Statement of Managers, which was drafted to reflect the views of the Conference Committee that considered the legislation and was inserted into the *Congressional Record* as part of the floor debate on the measure, states:

> The conferees argued to require the NRC to assess and collect annual charges from its licensees in an amount that, when added to other amounts collected by the Commission shall not exceed 33 percent of the Commission's budget for each fiscal year. Assuming the current level of NRC expenditures, this is expected to result in the collection of additional fees in an amount up to approximately $80 million per year for each fiscal year.

132 Cong. Rec. H. 879 (Daily Ed. March 6, 1986); 132 Cong. Rec. S. 2725 (Daily Ed. March 14, 1986).

We read this limited legislative history as indicating that Congress expected this legislation to result in approximately $80 million in collections each year above that already collected by the NRC under Part 170. To meet this target, collecting a full third of the NRC budget is required.

Such an interpretation is also consistent with the President's request to Congress that the NRC recover a far greater amount of its budget from user fees. The President in his proposed budget to Congress for fiscal year 1987 had suggested that 50 percent of the NRC budget be recovered through user fees, a figure adopted by the House of Representatives, but reduced in Conference Committee.

4. Inclusion of Research Costs in Fee Base

Comment: Commenters argued that the NRC research costs should not be recovered through fees.

Response: Commenters argued for instance that a boiling water reactor (BWR) licensee under the proposed rule would be paying for research on a pressurized water reactor (PWR) and vice versa. This could result in one group of licensees subsidizing another. It was also argued that other research costs may be relevant only to future generations of reactors, but of no benefit to the current reactors. The Commission has reviewed again the research portion (as well as the Nuclear Materials Safety and Safeguards, Nuclear Reactor Regulation, Inspection and Enforcement, and Analysis and Evaluation of Operational Data portions) of the cost basis for the annual fee. The purpose of this review was to ensure that only generic costs associated with all power reactors, with operating licenses, regardless of type, were included in the cost basis. Costs for research rulemaking and other activities not relevant to all reactors will not be recovered through fees. A detailed breakdown of costs to be recovered is available in the NRC Public Document Room in Washington, D.C. Based on this review, the cost basis for the annual fee has been revised as follows:

Fiscal Year 1987 Projections of NRC Costs for Nuclear Power Reactor Regulatory Generic Programs

(Dollars in thousands)

Programs	Costs for regulatory services
Research	$ 74,356
Safeguards	2,326
Reactor regulation	24,346
Inspection and enforcement	15,482
Analysis and evaluation of operational data	7,720
Total	$124,230

Because the costs listed above apply to all power reactors, the costs have been divided equally for purposes of calculating the annual fee. This approach is consistent with the Congressional directive that all fees be reasonably related to the cost of providing services.

5. Fines, Penalties, Interest, and Reimbursements

Comment: Commenters said that fines, interest, penalties, and reimbursements should be included in the cost basis as collections under other laws.

Response: The commenters argued that COBRA provides that the maximum total of fees to be collected by the NRC may not exceed, when added to other amounts collected by the Commission, 33 percent of the Commission's budget. Accordingly, they believe the 33 percent total is to be derived by adding fees collected to fines, interest, penalties, and reimbursements collected. The Commission rejects this argument. Fines and penalties are charged because of the failure of a licensee to adhere to prescribed standards or requirements. No public policy would be served by reducing a power reactor's annual fee because a utility violated NRC's requirements. We are unwilling to attribute such an intent to Congress. Nor do we believe Congress contemplated reducing fees to account for interest paid to the NRC. Interest is assessed only for late payment of monies due the United States. Accordingly, interest is not included in the cost base.

Finally, the NRC receives reimbursements from other Federal agencies of approximately $50,000 per year. We have not included this sum in the fee base. The purpose of COBRA was to generate additional Federal revenue as compensation for services rendered by the NRC. The transfer of funds from one Federal agency to another does not result in increased Federal revenue. Accordingly, Congress did not contemplate that reimbursements would be in the fee base.

6. Basing the Fee on Size of Reactor

Comment: The annual fee should be based upon the power rating in thermal megawatts for each reactor.

Response: The Commission has considered calculating the annual fee on power reactors with operating licenses on the thermal megawatt ratings of those reactors. An argument can be made that the larger the reactor, the greater the licensee's ability to generate income to pay the annual fee. The COBRA, however, requires that the fees be reasonably related to the agency's costs of providing services to the licensee. As discussed in the proposed rule (51 FR 24076, 24082-3), the Commission has examined the relationship between megawatt rating and the costs of NRC regulation. The NRC finds no necessary relationship or predictive trend between the thermal megawatt rating of a reactor and NRC regulatory costs (see Memorandum to Files,[1] entitled "Reactor Inspection, Licensing and Part 55 Fees Assessed for One-Year Period," dated July 7, 1986, from James Holloway, Acting Director, License Fee Management Staff, Office of Administration). Accordingly, the Commission has determined that fees should not be based on the size of the reactor. Nevertheless, in recognition of the problem that some licensees of smaller reactors may have in paying substantially increased fees, the Commission has provided for fee exemptions. This issue is discussed in item 8, Exemption Provision.

[1] A copy of this memorandum is available for review at the NRC Public Document Room, 1717 H Street, N.W., Washington, DC.

7. High-Level Waste Fund

Comment: The Department of Energy (DOE) should be assessed fees, payable from the high-level waste fund, for NRC services provided toward high-level waste management.

Response: The Commission has no legal authority to charge the DOE fees for NRC staff work associated with high-level waste. The IOAA and the Atomic Energy Act of 1954, as amended, do not authorize the NRC to charge the DOE fees. The Commission does not construe COBRA as augmenting NRC authority in such a way as to permit the NRC to collect fees from the DOE.

8. Exemption Provision

Comment: One commenter, a holder of a license for a small reactor, requested that provision for exemptions from the full annual fee be included in the final rule.

Response: While the Commission is concerned with recovering its costs, it is not the intent of the Commission to promulgate a fee schedule that would have the effect of imposing fees at such a level that the owners of the handful of small, older reactors would find it in their best economic interest to shut their reactors down. Therefore, the Commission has included an exemption provision that takes reactor size and age and other factors into consideration in determining whether a license should be exempted from the full annual fee.

9. Quarterly Assessments

Comment: Several commenters were concerned with the size of the annual fee and its effect on their cash flow. The commenters also suggested that the NRC not require payment of fees in a single lump sum.

Response: In recognition of these concerns, the Commission will collect the annual fee under Part 171 in equal quarterly installments. Fees collected under Part 170 will continue to be collected under the payment schedule set forth under that part.

10. Adjustments

Comment: Provision should be made for refunds if the total of fees collected exceeds 33 percent of the NRC budget enacted by Congress.

Response: The Commission agrees with commenters that the possibility exists, under both the proposed and final rules, that the aggregate of collections under Parts 170 and 171 could exceed the statutory limit of 33 percent of the NRC budget in a given fiscal year. Therefore, a section has been added to the final rule which requires that any such overpayment be returned on a prorata basis to those who pay fees under Part 171. Provision is also made for adjusting the refund to take into account any power reactors that were given an operating license during the course of the fiscal year and thus did not pay the full fee. If the prorata share of the overpayment is $10,000 or less, it will be credited against the annual fee for the following fiscal year.

Finally, if a final appropriation for the NRC has not been passed at the time the annual fee is set and if the final appropriation is greater or less than the projection, the annual fee would be raised or reduced, as appropriate, and an adjustment to the remaining quarterly installments or a refund would be made, as appropriate.

11. Comment Period

Comment: Some commenters argued that the Commission should have provided for more than a 15-day comment period on the proposed rule.

Response: The Commission was under a statutory mandate to promulgate final fee regulations 45 legislative days after submission of its July 7, 1986, report to Congress on user fees. A longer comment period would have prevented the Commission from meeting the Congressionally mandated deadline. Under the circumstances, the comment period was reasonable, particularly because licensees were on notice in April when COBRA was enacted that the NRC would be proposing substantially higher fees. Moreover, based on the thoroughness of the comments received and the numerous issues raised in

them, the Commission is convinced that all relevant issues of importance to this rulemaking have been identified and that the commenters have not demonstrated that they have been prejudiced by the 15-day comment period.

IV. Section-by-Section Revision

Section 171.1 Purpose.

The purpose section is revised to state that Part 171 sets out the fee to be charged persons licensed to operate a power reactor as defined in the new part.

Section 171.3 Scope.

The scope is revised to state that Part 171 applies only to persons licensed to operate a power reactor.

Section 171.5 Definitions.

In the final rule, the definitions for "Materials license," "Source material," and "Special nuclear material" have been deleted because licenses for these materials will remain subject to the appropriate fee schedule under 10 CFR Part 170. The definition for "Nuclear power reactor" has been modified to conform with the definition for "Power reactor" in 10 CFR Part 170.

Section 171.11 Exemption.

As stated in the proposed rule (51 FR 24078, 24082), the Congress urged the Commission to consider the impact of its fee schedule on certain licensees. Based on comments received, the Commission has determined that it is appropriate to take a similar approach in setting the fee schedule for power reactors with operating licenses. Accordingly, the added Exemption section provides that the holder of a license to operate a power reactor who believes that the annual fee is unfair or overly burdensome may apply to the Commission for partial relief from the annual fee. The Commission may grant such relief, if it is persuaded by the licensee that factors such as age and size of the plant and size and impact on its customer rate base substantially reduce the NRC's regulatory costs for that plant and the benefits bestowed on that licensee below that of the

other power reactors. Nevertheless, the agency's intent is to grant exemptions sparingly.

Section 171.13 Notice.

This section, which was § 171.11 in the proposed rule, is revised to reflect that only power reactors licensed to operate are covered by the final rule.

Section 171.15 Annual fee: Power reactor operating licenses.

The proposed § 171.15. Annual Fee: Materials Licenses, has been deleted. This renumbered section on computing the annual fee is revised to reflect that only power reactors will be subject to the annual fee under Part 171. The formula was also revised to deduct the estimated fees to be collected under Part 170. The fees under Part 170 are estimated for fiscal year 1987 to be $37 million. It is estimated that approximately $30 million of this amount will come from power reactors with operating licenses. The annual fee will be charged to every power reactor unit licensed to operate as of October 1, 1986 (assumed to be 101 reactors), and, on a prorata basis, to any power reactor licensed to operate during the fiscal year. If a power reactor licensee has only the authority to possess nuclear material and the Commission has received a request from the licensee to amend its license to permanently withdraw its authority to operate the reactor, or the Commission has permanently revoked such authority, the licensee is not subject to the annual fee under this part for that power reactor. Such reactors no longer benefit from the regulatory services that are the basis for the annual fee. Plants within this latter category, such as Dresden 1, Humboldt Bay, Peach Bottom 1, and Indian Point 1 will not be charged fees under this part (though they remain subject to any applicable fees pursuant to Part 170 of this chapter).

The annual fee is calculated as follows:

$405 million (NRC FY 87 budget) × .33 = $133 million (rounded down to the nearest million)

$133 million minus $37 million (est. fees Part 170, FY 87) = $96 million

$96 million divided by 101 licensed reactors = $950 thousand per license (rounded down to the nearest thousand).

Section 171.17 Proration.

Section 171.17 in the proposed rule addressed the annual fee and its calculation for major materials licenses. As they will not be subject to fees under this part, that section is deleted and a new § 171.17 is added to the final rule for the purpose of addressing the issue of prorating fees for power reactors that are licensed to operate after the beginning of a fiscal year. No such provision was necessary in the proposed rule. As revised, applications for operating licenses under review will still be subject to fees chargeable under Part 170. It would not be fair to holders of new operating licenses to charge them the full annual fee in addition to fees which might have accrued under Part 170 during a fiscal year but prior to issuance of an operating license. The annual fee would be prorated by first dividing the annual fee by 365 and then multiplying the quotient by the number of days remaining in the fiscal year after the operating license issuance date. For example, if an operating license were issued on January 15 of fiscal year 1987, the annual fee for that fiscal year would be $950,000 divided by 365, which is $2,603, and then multiplied by 258 (the number of days remaining in FY), which is $671,574.

Section 171.19 Payment.

This section, which was § 171.17 in the proposed rule, is revised in the final rule to allow the NRC to prescribe only those collection mechanisms that are acceptable to the U.S. Treasury Department. At this time, such mechanisms include checks, drafts, money orders, or the Electronic Funds Transfer System. This section also has been revised in the final rule to provide for payment in quarterly installments of the Part 171 fee rather than payment in a single lump sum as proposed.

Section 171.21 Refunds.

Section 171.21, in the proposed rule was Enforcement and is renumbered § 171.23 in the final rule. This new § 171.21 is added to address the contingency that by the end of a given fiscal year, the aggregate of collections under Parts 170 and 171 might exceed the statutory limit on collections of 33 percent of

the NRC budget. For example, several plants could be licensed to operate during the fiscal year and thereby pay a prorata share of the annual fee, or the number of amendments, inspections, or other activities subject to fees under Part 170 could be greater than estimated at the beginning of the fiscal year.

The purpose of the annual fee pursuant to Part 171 is to collect that portion of costs to the agency of providing regulatory services to power reactors, but with a ceiling on those collections equal to the difference between collections under Part 170 and 33 percent of the NRC budget. Accordingly, any collection of fees exceeding this ceiling will be refunded under this part. Refunds will be adjusted to allow for the fact that some licenses may only have been subject to a portion of the annual fee because the license to operate was issued during the fiscal year. However, it is anticipated that overpayments will arise under this provision rarely, if at all, and will probably not exceed $10,000 per license. Because of the administrative costs associated with making a refund from the U.S. Treasury, any overpayment of $10,000 or less will be credited against the annual fee for the following year.

Section 171.25 Collection, interest, penalties, and administrative costs.

This renumbered section, which was § 171.23 in the proposed rule, is modified slightly to reflect the requirement under 4 CFR Part 102 that, in addition to interest and penalties, administrative costs of collection also are recoverable by the NRC. The section is also modified in recognition of the authority given under § 171.19 to pay the annual fee in quarterly installments. If the quarterly installment is not paid on time in accordance with the schedule provided in § 171.19, then the full annual fee becomes immediately due and payable. Interest, penalties (if applicable), and administrative costs of collecting the fee will be calculated from the date that the late quarterly installment was due.

Unchanged Sections.

Sections 171.7, Interpretations, 171.9, Communications, and renumbered 171.23, Enforcement, are in this final rule as they were in the proposed rule.

10 CFR 51.22 Categorical exclusion.

The amendment to 10 CFR Part 51 to include Part 171 as a categorical exclusion is unchanged.

Commissioner Thomas M. Roberts abstained. The separate views of Commissioner Frederick M. Bernthal follow:

> While this final rule is a distinct improvement over the Commission's earlier proposed rule, it still suffers from several technical deficiencies, and more importantly, from fundamental infirmities which I noted in my previous views on this subject.
>
> Whether or not the user fee idea is conceptually sound, one cannot justify the assessment of one class of licensee to pay for "services" which benefit another. The user fee concept should be permitted to sink or swim in court on its own merits, unburdened by questions of equity in implementation.
>
> The final rule advanced by the Commission is so burdened to the extent that it (1) singles out one class of licensee for payment of the "extra fee" over and above the Part 170 fee schedule, and (2) charges the same "extra" fee to all holders of operating licenses, despite the fact that good performers will be subsidizing poor performers on whose behalf the NRC must frequently put forth extraordinary efforts.
>
> Further, this final rule does not assess the Department of Energy, via the nuclear waste fund or other appropriate machanism, for NRC services related to the Nuclear Waste Policy Act. Absent extraordinary accounting precaution by Congress in its annual appropriations, the rule would thus indirectly require utilities to subsidize the regulatory costs attendant to the geologic disposal of defense high level waste. If the user fee concept is to be applied at all, it ought to be applied in a manner such that, insofar as possible, all entities which derive a "benefit" from NRC services share equally the costs of providing that benefit.

Technical deficiencies of this rule aside, however, there are elemental reasons for concern with all rules such as this. User fees have an undeniable philosophical and popular appeal—after all, who can be against the benefactors of federal regulatory services paying the cost of such services? But the user fee principle must proceed from a single premise: namely, that such fees be required of *all* entities which are subject to government regulatory activity—in short, that there be a level playing field.

The playing field is not level. Nuclear utilities are now to be singled out for payment of a user fee tax, while Congress has not seen fit to levy corresponding charges on other utilities which are the "beneficiaries" of similar Federal regulatory activity. I make no judgment on the merits of the many and diverse regulatory activities of the Federal Government. But I fail to see how our licensees benefit more from regulatory services than do the coal-burning utilities upon whom the EPA conferred the "benefit" of requirements for scrubber installation to reduce stack emissions, or for that matter, than do the pharmaceutical houses regulated by the FDA, or than do a host of other industries now subject to the regulatory requirements of the government.

Indeed, I question the theory (and the Congress should be conerned, lest the impression be created) that our licensees are the principal beneficiaries of the services provided by this agency; the prime beneficiary is the public at large, whom we are mandated to protect. But if that is so, should our licensees then be required to pay not only for an NRC-mandated nuclear powerplant backfit, for example, but also for the costs of a belated agency decision to require the backfit (because earlier regulatory standards were found to be inadequate)?

In passing the 1954 Atomic Energy Act, Congress found that:

> [R]egulation by the United States of the production and utilization of atomic energy and of the facilities used in connection therewith is *necessary* . . . to *protect the health and safety of the public.* (emphasis added)

In the Energy Reorganization Act of 1974, Congress declared that the promotional and regulatory functions of the Atomic Energy Commission should be separated, because it was

"in the public interest", that the purpose of the Act was, among other things, "to assure public health and safety."

These Congressional findings and statements of purpose strongly suggest that the responsibilities of this agency are to be carried out for the benefit of the general public, and not for the benefit of any single enterprise, public or private. If there *were* any direct benefits to be conferred upon those whom we regulate, it seems clear that those vanished (and appropriately so) when the AEC was split and its promotional responsibilities assigned to agencies other than the NRC.

The American public, through its elected representatives, has thus charged the NRC with regulating the nuclear industry to promote safety and security. Yet the Commission is now required to implement legislation, the premise of which appears to be contrary to the stated purposes of this agency's enabling legislation.

I therefore approve this final rule only to permit the Commission to promulgate implementing regulations in fulfillment of its Congressional mandate.

Environmental Impact: Categorical Exclusion

The action required under this final rule is administrative and would not impact the environment. The Commission has determined pursuant to 10 CFR 51.22(a) that this final rule would be the type of action that is described in categorical exclusion 10 CFR 51.22(c)(1). Therefore, neither an environmental impact statement nor an environmental assessment has been prepared for this proposed rule.

Paperwork Reduction Act Statement

This final rule contains no information collection requirements and, therefore, is not subject to the requirements of the Paperwork Reduction Act of 1980 (44 U.S.C. 3501 et seq.).

Regulatory Analysis

The NRC's predecessor, the Atomic Energy Commission, adopted its first license fee schedule in the fall of 1968, as codified in 10 CFR Part 170. The authority to collect fees was based on Title V of the Independent Offices Appropriation Act

of 1952 (IOAA) (31 U.S.C. 9701). That fee schedule covered power reactors, test and research reactors, fuel reprocessing plants, and materials licenses. It was revised and updated in 1978 and 1984.

The license fees were designed to recover a part of the costs of services attributable to identifiable recipients. Only those costs that were associated with the review of a license application and related to a specific identifiable beneficiary were used in the cost base for the establishment of the fee schedule. Certain costs under the Commission's 1984 revised fee schedule in 10 CFR Part 170 (49 FR 21293) continued to be excluded from fees. Some of the costs that were excluded from the fee base were those associated with: (1) Research, (2) generic licensing activities, (3) standards and code development, (4) contested hearings, (5) the Office of International and State programs, (6) the Office of Inspector and Auditor, (7) the Office of Congressional Affairs, and (8) the Office of Public Affairs.

Section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985 requires the NRC to establish by rule an annual charge for its licensees that, when added to other amounts collected, is estimated to be equal to 33 percent of the estimated costs incurred by the Commission. This section authorizes NRC to expand its fee base to recover costs previously excluded, such as research and generic licensing activities. This final rule reflects NRC's interpretation of the intent of Section 7601.

Regulatory Flexibility Certification

This rule is not a major rule for the purpose of Executive Order 12291 of February 17, 1981. As required by the Regulatory Flexibility Act of 1980, 5 U.S.C. 605(b), and NRC Size Standards (50 FR 50241, December 20, 1985), the Commission hereby certifies that this final rule does not have a significant impact on small business entities. This rule affects only nuclear power plants licensed to operate. The companies that own these companies do not fall within the scope of the definition of "small entities" set forth in the Regulatory Flexibility Act.

List of Subjects

10 CFR Part 51

Administrative practice and procedure, Environmental impact statement, Nuclear materials, Nuclear power plants and reactors, Reporting and recordkeeping requirements.

10 CFR Part 171

Annual charges, Power plants and reactors. Penalty.

For the reasons set out in the preamble, and under the authority of the Atomic Energy Act of 1954, as amended, the Energy Reorganization Act of 1974, as amended, and 5 U.S.C. 553, the NRC is amending 10 CFR Chapter I as follows.

1. A new Part 171 is added to read as follows:

PART 171—ANNUAL FEE FOR POWER REACTOR OPERATING LICENSES

Sec.

Authority: Sec. 7601 Pub. L. 99-272, 100 Stat. 146, sec. 301, Pub. L. 92-314, 86 Stat. 222, (42 U.S.C. 2201(w)); sec. 201, 82 Stat. 1242, as amended (42 U.S.C. 5841).

§ 171.1 Purpose.

The regulations in this part set out the annual fee charged to persons licensed by the United States Nuclear Regulatory Commission to operate a power reactor as defined in this part.

§ 171.3 Scope.

The regulations in this part apply to any person holding an operating license for a power reactor as defined in this Part.

§ 171.5 Definitions.

"Budget" means the funds appropriated by Congress for the NRC for each fiscal year, and if that appropriation is not passed on or before September 1 for that fiscal year, the funds most recently appropriated by Congress for the most recent fiscal year.

"Commission" means the United States Nuclear Regulatory Commission or its duly authorized representatives.

"Federal fiscal year" means a year that begins on October 1 of each calendar year and ends on September 30 of the following calendar year. Federal fiscal years are identified by the year in which they end (e.g., fiscal year 1987 begins in 1986 and ends in 1987).

"Nuclear reactor" means an apparatus, other than an atomic weapon, used to sustain fission in a self-supporting chain reaction.

"Operating license" means having a license issued pursuant to § 50.57 of this chapter. It does not include licenses that only authorize possession of special nuclear material after the Commission has received a request from the licensee to amend its licensee to permanently withdraw its authority to operate or the Commission has permanently revoked such authority.

"Person" means: (1) Any individual, corporation, partnership, firm, association, trust, estate, public or private institution, group, Government agency other than the Commission; any state or any political subdivision of, or any political entity within, a state; any foreign Government or nation or any political subdivision of any such government or nation; or other entity; and (2) any legal successor, representative, agent, or agency of the foregoing.

"Power reactor" means a nuclear reactor designed to produce electrical or heat energy and licensed by the Commission under the authority of section 103 or subsection 104(b) of the Atomic Energy Act of 1954, as amended, and pursuant to the provisions of § 50.21(b) or § 50.22 of this chapter.

§ 171.7 Interpretations.

Except as specifically authorized by the Commission in writing, no interpretation of the regulations in this part by an officer or employee of the Commission, other than a written interpretation by the General Counsel, will be recognized as binding on the Commission.

§ 171.9 Communications.

All communications regarding the regulations in this part should be addressed to the Executive Director of Operations, U.S. Nuclear Regulatory Commission, Washington, D.C., 20555. Communications may be delivered in person to the Commission's offices at 1717 H Street N.W., Washington, DC.

§ 171.11 Exemption.

The Commission may, upon application, grant an exemption, in part, from the annual fee required pursuant to this part. An exemption under this provision may be granted by the Commission taking into consideration the following factors:

(a) Age of the reactor;
(b) Size of the reactor;
(c) Number of customers in rate base;
(d) Net increase in KWh cost for each customer directly related to the annual fee assessed under this part; and
(e) Any other relevant matter which the licensee believes justifies the reduction of the annual fee.

§ 171.13 Notice.

The first installment of the annual fee for fiscal year 1987 will become due and payable 30 days after the effective date of this final rule. Thereafter, the annual fee, applicable to a power reactor with a license to operate and calculated in accordance

with § 171.15 of this part, will be published in the **Federal Register** on or before September 1 each year. The fee will become due and payable to the NRC in accordance with § 171.19 of this part, except as provided in § 171.17 of this part. If the annual fee is based on the amount appropriated by the Congress for the prior fiscal year and Congress, during the fiscal year, enacts an appropriation different from that used in setting the fee, the annual fee will be revised to reflect the actual amount appropriated by Congress for the fiscal year. Notice of this revision will be published in the **Federal Register.**

§ 171.15 Annual Fee: Power reactor operating licensees.

(a) Each person licensed to operate a power reactor shall pay an annual fee for each power reactor unit for which the person holds an operating license at any time during the Federal Fiscal Year (FY) in which the fee is due.

(b) The basis for the annual fee shall be the sum of NRC costs budgeted for each FY for: (1) Research activities directly related to the regulation of power reactors, (2) power reactor regulation (except licensing and inspection activities, and Part 55 operator licensing and instructor certification), and (3) safeguards activities for power reactors (other than those activities directly associated with plant-specific licensing and amendments).

(c) If the basis for the annual fee is greater than 33 percent of the NRC budget less the total estimated fees chargeable under Part 170 of this chapter, then the maximum annual fee for each nuclear power reactor that is licensed to operate shall be calculated as follows:

(NRC FY Budget x .33) minus Est. Fees Part 170 divided by No. of Operating Licenses for Power Reactors equals Fee per License

(d) If the basis for the annual fee is less than the total NRC budgeted costs times 33 percent minus the estimated fees payable under Part 170, then the annual fee shall be calculated as follows:

Basis for Annual Fee divided by No. of Operating Licenses for Power Reactors equals Fee per License

(e) The annual fee for each power reactor licensed to operate as of October 1, 1986, is $950.00. Thereafter, annual fees will be assessed in accordance with § 171.13.

§ 171.17 Proration.

The annual fee for a power reactor granted its license to operate after October 1 of a FY shall be prorated on the basis of the number of days remaining in that FY. Thereafter, the full fee would be due and payable each subsequent FY. Licenses revoked, suspended, or for which the licensee has requested amendment to permanently withdraw operating authority during the FY will not result in any refund of the annual fee or any portion thereof.

§ 171.19 Payment.

Fee payments may be made in any manner allowed under U.S. Department of Treasury regulations and described in the **Federal Register** notice published pursuant to § 171.13 of this part. The annual fee shall be paid in quarterly installments of 25 percent. A quarterly installment is due on October 1, January 1, April 1, and July 1 of each year.

§ 171.21 Refunds.

If at the end of an FY, the aggregate of collections under 10 CFR Part 170 and this part exceeds 33 percent of the NRC budget, the overpayment will be refunded on a prorata basis to those licensees who have fees under this part, but with an appropriate adjustment for any reduced payments pursuant to § 171.17 of this part. Any overpayment of $10,000 or less (per license) will be credited against the annual fee for the following FY.

§ 171.23 Enforcement.

If any person required to pay the annual fee fails to pay when the fee is due, the Commission may refuse to process any application submitted by or on behalf of the person with respect to any license issued to the person and may suspend or revoke any licenses held by the person.

§ 171.25 Collection, interest, penalties, and administrative costs.

The annual fee will be collected pursuant to the procedures of 10 CFR Part 15. Interest, penalties, and administrative costs for late payments will be assessed in accordance with 10 CFR Part 15 of this chapter, 4 CFR Part 102, and other relevant regulations of the United States Government, as appropriate. In the event a quarterly installment is not made by the appropriate due date specified in § 171.19, the full fee becomes due and payable, with interest, penalties and administrative costs of collection calculated from the date that quarterly installment was due.

PART 51—ENVIRONMENTAL PROTECTION REGULATION FOR DOMESTIC LICENSING AND RELATED REGULATORY FUNCTIONS

2. The authority citation for Part 51 continues to read as follows:

Authority: Sec. 161, 68 Stat. 948, as amended (42 U.S.C. 2201); secs. 201, 202, as amended, 88 Stat. 1242, as amended, 1244 (42 U.S.C. 5841, 5842).

Subpart A also issued under National Environmental Protection Act of 1969, secs. 102, 104, 105, 83 Stat. 853-854, as amended (42 U.S.C. 4332, 4334, 4335); and Pub. L. 95-604, Title II, 92 Stat. 3033-3041. Section 51.22 also issued under sec. 274, 73 Stat. 688, as amended by 92 Stat. 3036-3038 (42 U.S.C. 2021).

3. In § 51.22, the introductory text of paragraph (c) is republished and a reference to Part 171 is added to paragraph (c)(1), which is revised to read as follows:

§ 51.22 Criterion for and identification of licensing and regulatory actions eligible for categorical exclusion.

* * * * *

(c) The following categories of actions are categorical exclusions:

(1) Amendments to Parts 0, 1, 2, 4, 7, 8, 9, 10, 11, 14, 19, 21, 25, 55, 75, 95, 110, 140, 150, 170, or 171 of this chapter, and

actions on petitions for rulemaking relating to these amendments.

• • • • •

Dated at Washington, DC. this 16th day of September 1986.

For the Nuclear Regulatory Commission.

Samuel J. Chilk,

Secretary of the Commission.

APPENDIX C

Section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82 (1986)

SEC. 7601. NUCLEAR REGULATORY COMMISSION ANNUAL CHARGES.

(a) SUBMISSION OF REPORT.—Within 90 days after the date of the enactment of this Act, the Nuclear Regulatory Commission shall submit to the Committee on Energy and Commerce and the Committee on Interior and Insular Affairs of the House of Representatives and the Committee on Environment and Public Works of the Senate a report evaluating the feasibility and necessity of establishing a system for the assessment and collection of annual charges from persons licensed by the Commission pursuant to the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.) to fund all or part of the activities conducted by the Commission pursuant to such Act. Such report shall include an analysis of—

(1) the extent to which the Commission's existing statutory or regulatory authority to assess and collect annual charges, including the authority of the Commission to assess and collect fees pursuant to title V of the Independent Offices Appropriation Act of 1952, is adequate to enable the Commission to assess and collect fees commensurate with the value of the benefit rendered to the licensee and the cost to the Commission of rendering such benefit;

(2) the amounts currently assessed and collected by the Commission pursuant to existing statutory or regulatory authority, and the purposes for which such fees are assessed and collected; and

(3) any recommendations of the Commission for expanding the existing statutory authority to assess and collect fees, including the Commission's justification for such expansion.

(b) ASSESSMENT AND COLLECTION.—

(1) IN GENERAL.—Upon the expiration of a period of 45 calendar days (excluding any day in which either House of Congress is not in session because of an adjournment of more than 3 calendar days to a day certain or an adjournment sine die) following receipt by the Congress of the report required pursuant to subsection (a), the Nuclear Regulatory Commission shall assess and collect annual charges from its licensees on a fiscal year basis, except that—

(A) the maximum amount of the aggregate charges assessed pursuant to this paragraph in any fiscal year may not exceed an amount that, when added to other amounts collected by the Commission for such fiscal year under other provisions of law, is estimated to be equal to 33 percent of the costs incurred by the Commission with respect to such fiscal year; and

(B) any such charge assessed pursuant to this paragraph shall be reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service.

(2) ESTABLISHMENT OF AMOUNT BY RULE.—The amount of the charges assessed pursuant to this paragraph shall be established by rule.

APPENDIX D

INDEPENDENT OFFICES APPROPRIATION ACT OF 1952 (31 U.S.C. 9701)

§ 9701. Fees and charges for Government services and things of value

(a) It is the sense of Congress that each service or thing of value provided by an agency (except a mixed-ownership Government corporation) to a person (except a person on official business of the United States Government) is to be self-sustaining to the extent possible.

(b) The head of each agency (except a mixed-ownership Government corporation) may prescribe regulations establishing the charge for a service or thing of value provided by the agency. Regulations prescribed by the heads of executive agencies are subject to policies prescribed by the President and shall be as uniform as practicable. Each charge shall be—

(1) fair; and

(2) based on—

(A) the costs to the Government;

(B) the value of the service or thing to the recipient;

(C) public policy or interest served; and

(D) other relevant facts.

(c) This section does not affect a law of the United States—

(1) prohibiting the determination and collection of charges and the disposition of those charges; and

(2) prescribing bases for determining charges, but a charge may be redetermined under this section consistent with the prescribed bases.

(Pub.L. 97-258, Sept. 13, 1982, 96 Stat. 1051.)

APPENDIX E

PETITIONERS[1] AND THEIR PARENT CORPORATIONS, SUBSIDIARIES (NON-WHOLLY OWNED) AND AFFILIATES

ARKANSAS POWER & LIGHT COMPANY
- Middle South Utilities, Inc.
- Mississippi Power & Light Company
- Louisiana Power & Light Co.
- New Orleans Public Service, Inc.
- Middle South Services, Inc.
- System Energy Resources, Inc.
- Associated Natural Gas

BALTIMORE GAS AND ELECTRIC COMPANY
- Safe Harbor Water Power Corporation

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

CONSUMERS POWER COMPANY
- CMS Energy Corporation
- CMS Enterprises Company
- Midland Cogeneration Venture Ltd. Partnership
- St. Clair Underground Storage
- Ticaboo Townsite Joint Venture
- Marysville Fractionation

DUQUESNE LIGHT COMPANY

FLORIDA POWER AND LIGHT COMPANY
- Agri + Lan, Inc.
- Alandco Inc.
- Allied Consumer Services Corporation
- Associated Bancard-Holders Travel Service, Inc.
- Associated Bancard-Holders, Inc.
- Associated Insurance Marketers International, Inc.
- Association Administrators, Inc.

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[1] Petitioners listed in alphabetical order.

Bay Loan and Investment Bank
Bonded Collection Corporation
Cascade Land and Development Company
CB Management, Inc.
CBR Collection Services Division, Inc.
CBR Information Group, Inc.
CCB Management of Texas, Inc.
Central Credit Clearing Bureau, Inc.
Colonial Claim Services, Inc.
Colonial Exchange, Inc.
Colonial Penn Annuity & Life Insurance Company
Colonial Penn Capital Holdings, Inc.
Colonial Penn Communities, Inc.
Colonial Penn Corporation
Colonial Penn Developers, Inc.
Colonial Penn Distributors Corp.
Colonial Penn Franklin Insurance Company
Colonial Penn Group Data Corp.
Colonial Penn Group, Inc.
Colonial Penn Heritage Insurance Company
Colonial Penn Holdings, Inc.
Colonial Penn Insurance Company
Colonial Penn Investment Advisors Corp.
Colonial Penn Life Insurance Company
Colonial Penn Properties, Inc.
Colonial Penn Services Corp.
Colonial Penn Underwriters, Inc.
Colonial Penn Warranty Services Company
CPC Agency, Inc.
CPI Investment, Inc.
Credit Bureau Data Service, Inc.
Credit Bureau of Alaska, Inc.
Credit Bureau of Greater St. Petersburg, Inc.
Credit Bureau of Lacrosse, Inc.
Credit Bureau of Orange County, Inc.
Credit Bureau of Shasta & Trinity Counties, Inc.
Credit Bureau Reports, Inc.
Credit Services International, Inc.
Damar Corporation
Enviroquip, Inc.

ESI Double "C", Inc.
ESI Geothermal II, Inc.
ESI Geothermal, Inc.
ESI Kern Front, Inc.
ESI Sierra, Inc.
FPL Asia, Inc.
FPL Energy Services, Inc.
FPL Enersys, Inc.
FPL Group Cable Inc.
FPL Group Capital Inc.
FPL Group, Inc.
FPL Holdings Inc.
FPL Investments Inc.
FPL Qualtec, Inc.
FPL Taiwan I, Inc.
FPL Taiwan II, Inc.
FPL Taiwan III, Inc.
FPL Taiwan IV, Inc.
FPL Taiwan V, Inc.
FPL Taiwan VI, Inc.
Group Association Plans, Inc.
Group Insurance Plans (North Carolina), Inc.
Hawthorne Advertising, Inc.
Hydro Resources, Inc.
International Credit Service, Inc.
Intramerica Life Insurance Company
Land Resources Investment Company
Microfiche Publishers, Inc.
Napohio Agency, Inc.
National Association Plans, Inc.
New York National Association Plans, Inc.
North Coast Credit Association
Palmetto Insurance Company Limited
Palms Insurance Company, Limited
PGI Acquisition Corporation
Praxis Group, Inc.
QTX, Inc.
Qualtec Professional Services, Inc.
Qualtec Testing Services, Inc.
Qualtec Training Services, Inc.

Real Estate Data, Inc.
Redi Realty Services, Inc.
Sanborn Map Company, Inc.
Select Mail of America, Inc.
Special Accident & Health Plans, Inc.
Telesat Cablevision of South Florida, Inc.
Telesat Cablevision, Inc.
The Credit Bureau of Salinas, Inc.
United Home Equity Services, Inc.
Women Unlimited, Inc.

GEORGIA POWER COMPANY

Southern Company
Alabama Power Company
Mississippi Power Company
Gulf Power Company
Southern Company Services, Inc.
Southern Electric International, Inc.
The Southern Investment Group, Inc.
Southeast Generating Company
Southern Electric Generating Company

HOUSTON LIGHTING & POWER COMPANY

Houston Industries Incorporated
Houston Industries Finance, Inc.
Primary Fuels, Inc.
Innovative Controls, Inc.
KBLCOM Incorporated
Utility Fuels, Inc.
Development Ventures, Inc.
Innovative Production, Inc.
KBL Communications, Inc.
PFI-Belize, Inc.
Primary Fuels Ghana, Inc.
Paragron Communications
Primary Fuels Canada, Inc.
AGRI-PETCO International, Inc.
International Tankship, S.A.
Primary Fuels, Argentina, Inc.

Primary Fuels International Ltd.
Primary Fuels Canada Ltd.
Westmont Oil, Inc.
South Pacific Oil, Inc.
Pacific Oil Marketing, Inc.
Hellenic Oil Company, Inc.
Selva Oil, Inc. (Delaware)
North Agean Petroleum Company
Capricorn Trading Company Ltd.

ILLINOIS POWER COMPANY

Electric Energy, Inc.
IP Gas Supply Company
Illinois Power Fuel Company
IPF (Illinois Power Finance) Company N.V.
I.P., Inc.
Champaign & Urbana Gas, Light & Coke Company
Danville Gas Light Company
The Jacksonville Gas, Light & Coke Company
Jacksonville Railway & Light Company
Venice Gas Company

INDIANA MICHIGAN POWER COMPANY

American Electric Power Company, Inc.
Appalachian Power Company
Ohio Power Company
Kentucky Power Company
Ohio Valley Electric Corporation
Columbus Southern Power
American Electric Power Service Company
AEP Energy Services, Inc.
AEP Generating Company
Franklin Real Estate Company
Kingsport Power Company
Michigan Electric Power Company
Michigan Power Company
Twin Bridge Railroad Company
Wheeling Power Company
Integrated Communications Systems, Inc.

IOWA ELECTRIC LIGHT POWER COMPANY

IE Industries, Inc.
Teleconnect Company
Cedar Rapids and Iowa City Railway Company
Iowa Land and Building Company
Metro Development Company
Industrial Energy Applications, Inc.
IEI Container Services Corp.
Long Lines, Ltd.
EnDYHNA Development Corp.
Heartland Rail Corporation
2001 Development Corporation
MicroFuel Corporation
Dubuque Sand and Gravel Company

KANSAS CITY POWER & LIGHT COMPANY

Wolf Creek Nuclear Operating Company
Utility Fuel Company

KANSAS ELECTRIC POWER COOPERATIVE, INC.

Wolf Creek Nuclear Operating Corporation
Utility Fuel Company

KANSAS GAS AND ELECTRIC COMPANY

Wolf Creek Nuclear Operating Corporation
Utility Fuel Company

LOUISIANA POWER & LIGHT COMPANY

Middle South Utilities, Inc.
Arkansas Power & Light Company
New Orleans Public Service, Inc.
Mississippi Power & Light Company
System Energy Resources, Inc.
MSU System Services, Inc.
Electec, Inc.

NEW YORK POWER AUTHORITY

NORTHERN STATES POWER COMPANY

PACIFIC GAS AND ELECTRIC COMPANY

- Alaska California LNG Company
- Alberta and Southern Gas Company Ltd.
- Alberta Natural Gas Company Ltd.
- ANGUS Chemical Company
- ANGUS Chemie GmbH.
- ANGUS Chemical (U.K.) Ltd.
- ANGUS Petroleum Corp.
- Calaska Energy Company
- Eureka Energy Company
- Gas Lines, Inc.
- JWP Land Company
- NGC Production Company
- Natural Gas Corp. of California
- PGandE Gas Supply Company
- Pacific Conservation Services Company
- Pacific Gas and Electric Finance Company N.V.
- Pacific Gas Marine Company
- Pacific Gas LNG Terminal Company
- Pacific Gas Indonesia LNG Company
- Pacific Gas Transmission Company
- Pacific Transmission Supply Company
- Rocky Mountain Gas Transmission Co.
- Standard Pacific Gas Line, Inc.

PENNSYLVANIA POWER & LIGHT COMPANY

- Safe Harbor Water Power Corporation

SOUTHERN CALIFORNIA EDISON COMPANY

- SCE Corp.
- Bear Creek Uranium Company
- Kern River Cogeneration Company
- Sycamore Cogeneration Company
- Sobel Cogeneration Company
- Midway-Sunset Cogeneration Company
- Watson Cogeneration Company
- Harbor Cogeneration Company
- Beowawe Geothermal Energy Company
- James River Cogeneration Company

Mid-Set Cogeneration Company
Ontario Airport Industrial Park
O'Hare Airport Joint Venture
Calabasas Park Company
Calabasas Park Company, Inc.

SYSTEM ENERGY RESOURCES, INC.
Middle South Utilities, Inc.
Arkansas Power & Light Company
Mississippi Power & Light Company
Louisiana Power & Light Company
New Orleans Public Service, Inc.
Middle South Services, Inc.
Associated Natural Gas

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
Centerior Energy Corporation
Centerior Service Company
The Toledo Edison Company

THE TOLEDO EDISON COMPANY
Centerior Energy Corporation
Centerior Service Company
The Cleveland Electric Illuminating Company

TU ELECTRIC
Texas Utilities Company
Texas Utilities Fuel Company
Texas Utilities Mining Company
Texas Utilities Services, Inc.
Basic Resources, Inc.
Chaco Energy Company

UNION ELECTRIC COMPANY

WASHINGTON PUBLIC POWER SUPPLY SYSTEM

WISCONSIN ELECTRIC POWER COMPANY
Wisconsin Energy Corporation
Wisconsin Natural Gas
Wisconsin Michigan Investment Corporation
Wispark Corporation

Wivest Corporation
Witec Corporation
Badger Service Company
Amtel Systems Corporation
Syndesis Development Corporation

WOLF CREEK NUCLEAR OPERATING CORPORATION
Kansas City Power & Light Company
Kansas Gas and Electric Company
Kansas Electric Power Cooperative, Inc.

YANKEE ATOMIC ELECTRIC COMPANY
New England Power Company
Connecticut Light & Power Company
Boston Edison Company
Central Maine Power Company
Public Service Company of New Hampshire
Western Massachusetts Electric Company
Montaup Electric Company
Central Vermont Public Service Corporation
Commonwealth Electric Company
Cambridge Electric Light Company

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No. 88-234

In the Supreme Court of the United States

OCTOBER TERM, 1988

FLORIDA POWER & LIGHT COMPANY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA AND UNITED STATES NUCLEAR REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

MEMORANDUM FOR THE RESPONDENTS

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MEMORANDUM FOR THE RESPONDENTS

Section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), Pub. L. No. 99-272, 100 Stat. 146-147 (to be codified at 42 U.S.C. 2213), directs the Nuclear Regulatory Commission (NRC or Commission) to collect 33 percent of its annual budget by assessing fees on NRC licensees that are "reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service." Acting under that mandate, the Commission adopted a rule for fiscal year 1987 that imposed a fee of $950,000 on each holder of a license to operate a nuclear reactor (Pet. App. 4a). Petitioners contend that Section 7601 of COBRA, as interpreted by the Commission, is an unconstitutional delegation of the legislative power of taxation.

1. Before COBRA was enacted, the NRC imposed certain user fees under the Independent Offices Appropriation Act of 1952 (IOAA), 31 U.S.C. 9701. That statute allows the Commission, as well as other government agencies, to charge fees for services rendered to a particular entity. Under the IOAA, the Commission charged fees for individualized services performed for regulated entities (*e.g.*, inspections), but did not charge fees for projects that affected more than one entity, such as research and rulemaking. Pet. App. 3a.

In 1986, Congress adopted Section 7601 of COBRA, directing the Commission to collect up to 33 percent of its budget through charges imposed on NRC licensees. Under Section 7601(b)(1)(B) of that Act, the Commission must assess annual fees that are "reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service." Acting within COBRA's short deadlines, the Commission adopted a rule requiring operators of nuclear power plants to pay $950,000 per reactor for fiscal year 1987. Those fees help to recover the costs of the Commission's generally applicable programs, such as research, that are essential to the Commission's regulation of all commercial nuclear power reactors. Pet. App. 3a-4a.[1]

2. Petitioners, who own or operate nuclear power reactors licensed by the Commission, sought judicial review of the Commission's fee rule for fiscal year 1987 in the United States Court of Appeals for the District of Columbia Circuit. The court of appeals upheld the Commission's rule (Pet. App. 1a-21a). The court first rejected peti-

[1] The Commission made adjustments to its fee calculation at the end of fiscal year 1987 and returned over $100,000 to each licensee (Pet. App. 4a n.3). The Commission's fee rule also allows licensees to seek an exemption from paying the fee in certain circumstances.

tioners' claim that Section 7601 of COBRA allows the Commission to charge fees only for services that are directly and specifically performed for the benefit of a particular licensee. The court noted that petitioners' view of COBRA would make that statute identical to the IOAA, which allows the Commission to charge user fees only for services performed with respect to a particular entity (Pet. App. 6a). The court observed, however, that Congress clearly wanted Section 7601 of COBRA to go beyond the IOAA. The Floor Managers of COBRA stated that Section 7601 was designed to establish a "standard separate and distinct" from the IOAA "in order to permit the Commission to more fully recover the costs associated with regulating various categories of Commission licensees" (Pet. App. 6a). Accordingly, the court concluded that the Commission did not violate Section 7601 by charging fees to pay for general programs that apply to the entire class of nuclear-reactor licensees.[2]

The court of appeals next held that Section 7601 of COBRA is not an unconstitutional delegation of Congress's power to tax. The court assumed that Section 7601 creates a "tax," but held that Congress may delegate "the tax power where adequate standards are set for implementation of congressional intent" (Pet. App. 17a). Thus, the court of appeals rejected petitioners' contention that, under this Court's decision in *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974), Congress may not give the Executive Branch discretion in implementing tax laws. And the court held (Pet. App. 19a) that Section 7601 satisfies the test for legitimate delegation of congressional authority by setting forth in-

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[2] The court also rejected (Pet. App. 8a) petitioners' claim that the Commission's research projects are not a "regulatory service" within the meaning of Section 7601(b)(1)(B).

telligible standards to which the Commission is directed to conform, *e.g.*, the provision requiring that the Commission collect 33 percent of its budget through fees that are reasonably related to the regulatory service provided.

Judge Starr dissented. He believed that the Commission's rule violated Section 7601 of COBRA because it "makes no attempt to allocate specific benefits to identifiable beneficiaries" (Pet. App. 24a). He stated that Section 7601 of COBRA requires the Commission to "make some assessment of which (and how much) licensees are benefited by its 'regulatory services' " (*ibid.*). Judge Starr thought that petitioners' constitutional challenge counseled in favor of this narrow construction of COBRA.

3. In this petition, petitioners renew their claim that Section 7601 of COBRA, as interpreted by the Commission, is an unconstitutional delegation of Congress's power to tax. They argue that Section 7601 is constitutional only if it is read to limit the Commission to recovering the costs of specific services that provide "value directly to identifiable beneficiaries" (Pet. 12).

On October 3, 1988, the Court noted probable jurisdiction in the government's appeal in *Burnley* v. *Mid-America Pipeline Co.*, No. 87-2098. *Mid-American Pipeline* concerns the constitutionality of Section 7005 of COBRA, which directs the Department of Transportation to recover the costs of two pipeline safety programs by collecting fees from pipeline operators. The district court in *Mid-American Pipeline* held that Section 7005 is an unconstitutional delegation of the taxing power. Sections 7005 and 7601 of COBRA contain similar fee provisions[3]

[3] Section 7005 of COBRA directs the Department of Transportation to fund two safety programs by assessing fees "in reasonable relationship" to three criteria. Section 7601 tells the Commission to fund up to one-third of its budget through fees charged to licensees that are "reasonably related" to the Commission's regulatory services.

and the legal challenges in this case and *Mid-American Pipeline* are analogous. Thus, as petitioners here acknowledge, "the basic questions" raised by this petition "are already before [the] Court in" *Mid-American Pipeline*" (Pet. 6).[4] Hence, this case should be held pending the Court's decision in *Burnley* v. *Mid-America Pipeline Co.* and disposed of in light of that decision.

Respectfully submitted.

CHARLES FRIED
Solicitor General

WILLIAM H. BRIGGS, JR.
Solicitor
Nuclear Regulatory Commission

OCTOBER 1988

[4] We have furnished petitioners with a copy of our jurisdictional statement in *Burnley* v. *Mid-America Pipeline Co.*, No. 87-2098.

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No. 88-234

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TO THE UNITED STATES COURT OF APPEALS
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PETITIONERS' REPLY TO RESPONDENTS' MEMORANDUM

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October 20, 1988

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ON PETITION FOR A WRIT OF CERTIORARI
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PETITIONERS' REPLY TO RESPONDENTS' MEMORANDUM

In their Memorandum For The Respondents, the Government Respondents point to this Court's October 3, 1988 action noting probable jurisdiction in *Burnley* v. *Mid-America Pipeline Co.*, No. 87-2098, and to the similarity of the issues in this case and in *Mid-America*. Respondents suggest that "this case should be held pending the Court's decision in *Burnley* v. *Mid-America Pipeline Co.* and disposed of in light of that decision." Memorandum For The Respondents at 5.

Petitioners disagree and submit that the Court's consideration of the issues posed by user fee statutes and proper administration of the somewhat different statutes at issue in the two cases will be best served by granting the instant petition and considering it together with *Mid-America*. The Court followed a similar course in *National Cable Television Ass'n, Inc.* v. *United States*, 415 U.S. 336 (1974), and *Federal Power Comm'n* v. *New England Power Co.*, 415 U.S. 345 (1974). In

those cases, certiorari petitions, filed at different times from conflicting decisions of the Fifth and District of Columbia Circuits and interpreting the fees provisions of the Independent Offices Appropriations Act of 1952 ("IOAA"), 31 U.S.C. § 9701 (1982), were granted on the same day and set for argument together. *See* 411 U.S. 981 (1973); 411 U.S. 983 (1973).

Both this case and *Mid-America* implicate the growing practice of Congress to delegate to executive and administrative agencies authority to raise revenues from individuals and entities subject to the agencies' regulatory authority.[1] The Solicitor General recognized the common nature of the problems in the Jurisdictional Statement in *Mid-America* (at 7) when he described that case and this as involving "a similar constitutional challenge," and in the Memorandum For The Respondents (at 5) herein when he stated that "the legal challenges in this case and *Mid-America Pipeline* are analogous." There is a conflict between the courts below concerning the appropriate disposition of that challenge.

The questions presented by the two cases are substantial[2] and involve constitutional restrictions on the delegation of powers, particularly on delegation of the power to tax, and their relationship to statutory interpretation. *See, e.g., Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607, 685-87 (1980) (Rehnquist, J. concurring in the judgment); *Synar* v. *United States*, 626 F. Supp. 1374, 1385-86 (D.D.C.) (three-judge panel) (*per curiam*), *aff'd sub nom. Bowsher* v. *Synar*, 106 S. Ct. 3181 (1986); *National Cable Television Ass'n*, 415 U.S. at 336; *New England Power Co.*, 415 U.S. at 345.

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[1] Six examples are cited in the Petition in this case, at 6-8.

[2] The Government Respondents agree that the questions involved are substantial. *See* Jurisdictional Statement, *Burnley* v. *Mid-America Pipeline Co.*, No. 87-2098 (June 23, 1988), at 7-8.

Even though the cases involve essentially similar basic questions, they are not identical, and the differences may be significant to delineating the limits on the delegation of taxing power. This case and *Mid-America* involve different sections of the same Act. *Mid-America* involves section 7005 of the Consolidated Omnibus Reconciliation Act of 1985 ("COBRA"), Pub. L. No. 99-272, 100 Stat. 82, 140-41 (1986) (to be codified at 49 U.S.C. app. § 1682a), respecting fees related to usage of natural gas and hazardous liquid pipelines. This case involves section 7601, 100 Stat. 82, 146-47 (1986) (to be codified at 42 U.S.C. § 2213), relating to annual charges imposed upon licensees by the Nuclear Regulatory Commission. The legislative "standards" purportedly to be applied by the agency to which the power to assess fees is delegated[3] and the amount to be collected[4] differ. In addition, this case also raises significant questions of statutory interpretation which are not raised in *Mid-America*. Consequently, addressing the cases together or in close proximity may add a perspective helpful to considered judgment by the Court in providing comprehensive guidance to Congress.

Finally, Respondents' suggestion to defer this case pending a determination in *Mid-America* involves potential significant disadvantages in terms of delaying a final decision in this case. A not unlikely consequence of adopting the Respondents' suggestion is that after the decision is issued in *Mid-America* — and that would probably be no earlier than next spring — this case would be remanded to the court below and

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[3] *E.g.*, "a reasonable relationship to volume-miles, revenues or an appropriate combination thereof. . . ." (COBRA, § 7005(a)(1)); "reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service." (COBRA, § 7601(b)(1)(A)).

[4] *E.g.*, "sufficient to meet the costs of. . ." designated activities (COBRA, § 7005(d)); not to exceed an amount which, together with certain other fees, "is estimated to be equal to 33 percent of the costs incurred by the Commission. . ." in the fiscal years affected. (COBRA, § 7601(b)(1)(A)).

be followed by proceedings in that court involving still another extended period of time. The result might well be to leave Congress uncertain as to the limits of user fee legislation for another fiscal year.

For the foregoing reasons, we respectfully suggest that the Court give consideration to granting the instant Petition at this time and hearing argument together with or closely following *Mid-America*. In making this suggestion, Petitioners are aware that, in order to avoid delay in handling *Mid-America* or other matters, Petitioners may have to meet an expedited briefing schedule, and are prepared to do so.

Respectfully submitted,

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October 20, 1988

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No. 88-234

IN THE

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UNITED STATES OF AMERICA AND
UNITED STATES NUCLEAR REGULATORY COMMISSION,
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On Petition For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF NATIONAL TAXPAYERS UNION, CITIZENS FOR A SOUND ECONOMY, CONSUMER ALERT, AND AMERICANS FOR TAX REFORM AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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BRIEF OF NATIONAL TAXPAYERS UNION, CITIZENS FOR A SOUND ECONOMY, CONSUMER ALERT, AND AMERICANS FOR TAX REFORM AS AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Amici curiae National Taxpayers Union ("NTU"), Citizens for a Sound Economy ("CSE"), Consumer Alert, and Americans for Tax Reform ("ATR") submit this brief in support of the Petition for a Writ of Certiorari ("Petition") filed by Florida Power & Light Company, et al., seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit in *Florida Power & Light Company v. United States*, 846 F.2d 765 (D.C. Cir. 1988).[1] All parties have consented in writing to the filing of this brief, and copies of the consents have been filed with the Clerk.

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[1] The opinion of the Court of Appeals appears in the Appendix of the Petition ("Pet.App.") at 1a-32a.

INTEREST OF AMICI CURIAE

The National Taxpayers Union, Citizens for a Sound Economy, Consumer Alert, and Americans for Tax Reform are nonprofit organizations[2] dedicated to the promotion of economically sound and just government policies in the public interest. NTU, with 150,000 members nationwide, focuses on tax policy, among other issues, as does ATR. Consumer Alert, with 6,000 dues-paying members in 50 states, focuses on consumer interest in a broad range of issues, including tax policy questions. CSE, with 250,000 members nationally, focuses on the public interest in a strong, growing economy, which centrally involves tax and budget policies.

These four organizations all work to hold legislators publicly accountable for their positions on tax policy issues. Legislators can evade such accountability, however, if they are allowed to delegate the power to impose taxes or charges under the cover of vague language which does not clearly and expressly state what tax policies are to be followed. The decision of the majority below, however, seems to approve such evasion. By so doing, it undermines not only the ability of public interest organizations like the *amici* to hold legislators accountable, but the effectiveness and integrity of the democratic process generally. The *amici* support the granting of the requested writ of certiorari both to preserve their ability to hold legislators publicly accountable and to advance the general public interest in maintaining the important safeguards established by this Court in *National Cable Television Association, Inc. v. United States,* 415 U.S. 336 (1974) ("National Cable").

SUMMARY OF ARGUMENT

This case presents important questions of law, which are raised by an increasing number of statutes delegating the power to set fees, one of which is already before this Court. Moreover, the decision of the majority below directly conflicts with *National Cable,* sharply narrowing its reach and the important safeguards it provides.

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[2] NTU, CSE and ATR have each qualified for tax exemption under Section 501(c)(4) of the Internal Revenue Code. Consumer Alert has qualified for tax exemption under Section 501(c)(3) of the Code.

Under Section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), 42 U.S.C. § 2213, Pet.App. 62a-63a, the Nuclear Regulatory Commission ("NRC" or "Commission") has imposed fees on some of its licensees. These fees are not assessed in return for specific benefits rendered to the licensees, but rather for broad benefits to the general public such as public health and safety. As such, these charges are more in the nature of taxes rather than user fees. In granting the power to impose such broadly discretionary taxes to Federal agencies by means of language which fails clearly and expressly to indicate the policies adopted, Congress can evade democratic accountability for such taxes.

National Cable addressed this problem by establishing a general principle of interpretation applicable to all fee statutes: absent a clear and express statement delegating the power to impose taxes unrelated to benefits, the courts are to interpret such statutes as providing for true user fees. That is, the agencies are limited to charging only for specific benefits to each feepayer. Just as with the statute considered in *National Cable,* Section 7601 of COBRA lacks a clear and express statement delegating the power to tax unrelated to benefits. Consequently, Section 7601 must also be interpreted in accordance with the rule laid down in *National Cable.* If the Section is read as allowing the fees imposed by NRC, then it is an unconstitutional delegation of the power to tax.

The *amici* submit, therefore, that this Court should issue the requested writ of certiorari to review the decision of the court below.

ARGUMENT

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH SHOULD BE DECIDED BY THIS COURT

A. The NRC Fees Do Not Charge for Specific Benefits to Those Paying the Fee, But Rather for Broad Benefits to the General Public, Thereby Raising Fundamental Constitutional Concerns.

Section 7601 of COBRA is just one leading example of a growing trend which constitutes a significant new development in tax policy.[3] The Section in general authorizes the NRC to impose annual fees on its licensees. The actual fees imposed by the NRC under this Section do not charge for the cost of specific services providing value to individual licensees. Rather, they charge the licensees for the costs of NRC activities that serve broad interests of the general public, such as public health and safety. 51 Fed. Reg. 24,078-82 (1986); 51 Fed. Reg. 33,224-31 (1986). The important questions of Federal law presented by this case are whether Section 7601 can be properly interpreted as delegating the authority to impose such fees, and if so whether such a delegation is constitutionally permissible.

In *National Cable*, this Court required that fees analogous to those in the instant case be limited to the cost of specific services which provide specific value directly to those paying the fees. As such, the Court provided a correct definition of true

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[3] Among other recent statutes which have delegated authority to set fees, Section 7005 of COBRA, 49 U.S.C. app. § 1682a, provides for the Department of Transportation ("DOT") to impose fees on usage of natural gas and hazardous liquid pipelines to finance the costs of the Department's pipeline safety program. Section 5002 of COBRA, 47 U.S.C. §§ 156, 158 provides for the Federal Communications Commission to impose charges to finance its regulatory activities. Section 13031 of COBRA, 19 U.S.C. § 58c, provides for the U.S. Customs Service to establish similar fees. Section 3401 of the Omnibus Budget Reconciliation Act of 1986, ("OBRA 1986") 42 U.S.C. § 7178, provides for the Federal Energy Regulatory Commission ("FERC") to establish fees on oil and gas pipelines and public utilities to finance its activities. Section 10511 of the Omnibus Budget Reconciliation Act of 1987, 26 U.S.C. § 7801 provides for the Secretary of the Treasury to impose fees to recover costs of the Internal Revenue Service.

user fees. *See* Gillette and Hopkins, *A Report to the Administrative Conference of the United States on Federal User Fees-Part A: Analysis of Legal and Economic Issues* (May 1987). As noted in the Petition at 12, user fees complying with this standard are sharply limited as to who will pay and the amount to be paid. The fees can be assessed only against those who individually receive specific, direct benefits from the agency, usually through their own voluntary application, and the amount of the fee is limited to the agency's costs in providing the benefit.

Fees that do not comply with this standard, like the NRC charges at issue in this case, are not true user fees. Rather, they are more in the nature of taxes, raising funds to finance government programs for the benefit of the general public. Gillette and Hopkins, *supra*, at 77. Indeed, as the NRC and the majority below interpret Section 7601, the Commission has almost unbridled discretion to determine who among its licensees should have to bear the fees, and how much each should have to pay. See Petition at 17-18. Such broad, arbitrary discretion is characteristic of taxes, not user fees, as this Court explained in *National Cable*, saying,

> Taxation is a legislative function, and Congress, which is the sole organ for levying taxes, may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer and go solely on ability to pay, based on property or income. 415 U.S. at 340.[4]

When Congress grants this power to impose broadly discretionary taxes to a federal agency, fundamental concerns are raised regarding the operation of our democratic process. Senators and Congressmen can avoid democratic accountability if they can delegate the power to tax under the cover of vague

[4] The majority below revealed that it failed to understand the central issue in this case when it characterized Petitioners' argument as inviting a "metaphysical debate" over whether the NRC annual charge is a "fee" or a "tax." As Petitioners note, the question is instead whether delegated power to impose charges will be open-ended without meaningful restriction, or subject to the well-defined limitations of user fees as elaborated by this Court in *National Cable*. Petition at 12.

generalities that do not clearly and expressly state what they are voting for. Each of the *amici* is heavily involved in efforts to hold elected officials accountable on tax issues, and can see the impact such delegation would have on their own activities. Holding a legislator accountable requires effective communication to voters concerning what the legislator has voted for and against and how that affects them. But such an effort can be shortcircuited if a Senator or Congressman can claim that he or she has simply voted for "fairness" and other generalities in the authorizing legislation, and that the taxes were imposed by a remote agency over which the legislator has no direct control. When the agency has the discretion to choose both who is to be subject to the tax and the amount to be assessed, the opportunity to deny responsibility on the part of legislators is even greater. Effectively communicating to the public a legislator's responsibility for such matters is feasible only when legislators are required to adopt, by public and recorded votes, legislation which clearly and expressly states the tax policies being adopted.

The activities of Americans for Tax Reform offer a specific example of the problem. ATR conducts a nationwide Pledge Campaign each election year, asking Congressional candidates to pledge not to vote to raise taxes if elected. Hundreds of candidates, both Democrats and Republicans, took the Pledge in 1986, and the same campaign is underway this year. But members of Congress can evade the Pledge if they can delegate the power to tax to Federal agencies while disclaiming responsibility for raising taxes. Explaining to the public who should be held accountable in this case and why, and overcoming the legislator's own denial of responsibility, may be impossible. In any event, such an effort is much more difficult than communicating that an official has directly voted to increase taxes in violation of the Pledge, in a recorded vote which cannot be denied.

The issue is not merely a matter of the ability of the *amici* to perform their functions. The public interest lies in maximizing the control of the voters over the critical legislative power of taxation. The only way to assure that the taxing power is not abused is to require that those most directly accountable through the democratic process make the decisions

regarding taxation. As Chief Justice John Marshall wrote in *McCulloch v. Maryland,* 17 U.S. (4 Wheat.) 316, 428 (1819),

> The only security against the abuse of this power [of taxation] is found in the structure of government itself. In imposing a tax, the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation.

See also Freedman, *Crisis and Legitimacy: The Administrative Process and American Government* 85-88 (1978). Allowing legislators to grant to others the power to impose taxes unrelated to benefits without a clear and express statement of what they are voting for places an undue burden on the operation of the democratic process and substantially weakens democratic control over the critical taxation power.

This weakening of democratic control is of particular concern when dealing with the power to tax. The very founding of our nation grew out of the insistence of our people on democratic control over taxation. As Professor James Freedman has written,

> The power to tax is surely one of the most important of the legislative powers created by the Constitution. In the history of other nations, as the Framers had good reason to know, the power to tax had proved strikingly susceptible to oppressive application and abuse .... Rhetoric decrying taxation without representation was a part of the Framers' revolutionary heritage, affording them particular cause to construct protections against the possibility that such a momentous power might come to be exercised by small numbers of men in dark ministries. The decision of the Framers to place the power to impose taxes in the legislative branch of government was a response to these considerations.

Id. at 85. Indeed, the Constitution provides that all tax bills shall originate in the House of Representatives, the body closest to the people where representatives are elected every two years. U.S. Const., Art. I, § 8, cl.1. In so doing, the framers indicated

precisely their desire to maintain democratic accountability and control over the power to tax.

Such concerns are what led this Court in *National Cable* to limit the fees in that case to charging only for the cost of providing specific benefits directly to the individual feepayers. The Court said,

> It would be such a sharp break with our traditions to conclude that Congress had bestowed on a federal agency the taxing power that we read 31 U.S.C. § 483, narrowly as authorizing not a "tax" but a "fee."

415 U.S. at 341. *See also* 415 U.S. at 342 (reading the Act in that case "narrowly to avoid constitutional problems" involving delegation of the power to tax); *Mid-America Pipeline Company v. Dole,* No. 86-C-815E (N.D. Okla. slip opinion, August 5, 1987) (striking down fees imposed by DOT under Section 7005 of COBRA as involving an unconstitutional delegation of the power to tax).

The importance of these concerns is heightened by the fact that Section 7601 is part of a broad trend imposing taxes denominated as "fees" or "charges." Congress has increasingly provided for fee-setting authority by federal agencies as a means to raise revenues.[5] These fee statutes (and others Congress will undoubtedly pass in the future) present the same concerns and questions of interpretation and constitutionality as does Section 7601 in this case.

In fact, these same questions are already before this Court in *Burnley v. Mid-America Pipeline Company,* No. 87-2098, October Term, 1987. In that case, the United States District Court for the Northern District of Oklahoma struck down the DOT fees adopted under Section 7005 of COBRA, as involving an unconstitutional delegation of the power to tax. The Government has appealed that decision to this Court, noting correctly that the decision of the majority below in the present case is in direct conflict with the decision in *Mid-America Pipeline,* and that the two cases present similar questions of substantial importance. Jurisdictional Statement, *Burnley v.*

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[5] See, *supra,* at 4, n.3.

Mid-America Pipeline Company, No. 87-2098 (June 23, 1988). Moreover, the FERC fees adopted under Section 3401 of OBRA 1986 are under challenge in six consolidated proceedings in the District of Columbia Circuit, *Interstate Natural Gas Ass'n of America v. FERC,* Nos. 87-1570 et al. (D.C. Cir. filed Oct. 9, 1987), and also in proceedings before the same Federal district court which struck down Section 7005 of COBRA as unconstitutional, *Mid-America Pipeline Company v. FERC,* No. 87-C-571E (N.D. Okla. filed July 20, 1987).

Given the fundamental importance of the issues presented by this case, the fact that the issues are already before this Court in *Mid-America Pipeline,* and the increasing number of statutes which present these issues, *amici* urge this Court to issue the requested writ of certiorari to review the decision below. Moreover, as discussed further, *infra,* the decision of the majority below directly conflicts with the decision of this Court in *National Cable.* As a result, we submit that the decision below must be reviewed and corrected.

B. The NRC Fees Should Be Struck Down, Either Because They Are Contrary to *National Cable,* or, if Section 7601 Is Read to Authorize Such Fees, Because the Fees Involve an Unconstitutional Delegation of the Power to Tax.

This Court in *National Cable* struck down fees imposed by the Federal Communications Commission ("FCC") under the Independent Offices Appropriation Act ("IOAA"), 31 U.S.C. § 9701, Pet.App. 64a. Despite the broad language of the IOAA, the Court held that the FCC could charge fees only to cover the costs of specific services which provide particular benefits to those being charged, that is, benefits "not shared by other members of society". 415 U.S. at 340.

The decision in *National Cable* was not based on an exploration of the statutory language or legislative history of the IOAA. Rather, the decision stemmed from the con-

stitutionally based concerns discussed above, concerns which are presented by all fee statutes. To address these concerns, the Court established a general principle of interpretation that applies to all such statutes: absent a clear and express statement delegating the power to impose taxes unrelated to benefits received, the courts are to interpret such statutes as providing for user fees which charge each feepayer only for the costs of specific services providing particular value directly received by the feepayer. Because the Court in *National Cable* found no such clear and express statement in the IOAA; it held that agencies only have authority under that statute to assess and collect user fees as circumscribed by the Court; they do not have the power to impose what amount to open-ended taxes.

By requiring a clear and express statement of delegation of the power to assess charges unrelated to benefits, the *National Cable* doctrine limits the circumstances where such broad based delegations will be upheld. As such, the doctrine directly addresses the public interest in democratic accountability, because legislators are thereby required to state clearly and expressly what they are voting for.

As noted by Petitioners, Section 7601 of COBRA lacks a clear and express statement delegating the power to impose taxes unrelated to benefits. That is precisely the defect of the IOAA provision addressed by this Court in *National Cable.* Petition at 12-13. The holding in *National Cable,* consequently, requires that Section 7601 be interpreted as providing for user fees which charge each beneficiary only for the costs of specific services providing value directly to the individual feepayer being charged. Judge Starr recognized in dissent below that Section 7601 of COBRA presents "the identical situation" that confronted this Court in *National Cable* "when it first addressed the IOAA," and, that therefore, Section 7601 must also be construed narrowly. As Petitioners note, this is not an argument that fees under Section 7601 of COBRA must comply with the statutory standards of the IOAA or that the IOAA provides for the constitutional outer limits of delegable fee setting authority, as respondents argued below. Rather, it is a recognition that *National Cable* established a general principle of interpretation that applies as well to the language of Section 7601 of COBRA. Petition at 13.

The majority below failed to apply the principle of interpretation established by *National Cable.* By so doing, they failed to address the fundamental, constitutionally-based concerns discussed above. If the decision of the majority below is allowed to stand, *National Cable's* important legal safeguards protecting democratic accountability and control over the power to tax will be eliminated. The *amici* submit that this Court should issue the requested writ of certiorari and reaffirm the continuing validity of *National Cable.*

If Section 7601 is read to authorize the NRC annual fees, then the section contains no effective standards to guide the delegation of the taxing power. Lacking such standards, the section is an unconstitutional delegation of the power to tax. It leaves the Commission with virtually unlimited discretion to determine who among its universe of licensees have to pay the fees, and how much each will have to pay, from $0 to $1 million per year or more. Petition at 17-18.

If the delegation of such power to the NRC under Section 7601 is allowed to stand it is difficult to see how there can be any effective limitation on delegations of the power to tax. A legal precedent would be set for wide-ranging delegations that would fundamentally change the way taxes are adopted and imposed in our society. Under this precedent, Congress might by analogy delegate to the Internal Revenue Service the power to raise taxes to balance the budget, guided only by standards as vague as those provided in Section 7601—*e.g.*, that "the tax burden be reasonably related to ability to pay," or that "unmanageable, harsh or discriminatory tax burdens be avoided" or that "the agency take into account likely impacts on the economy." Allowing such delegations would seriously undermine democratic accountability and control over the power to tax, contrary to the most fundamental traditions of our nation. *See* discussion, *supra,* at 5-8.

Numerous courts have suggested that such open-ended delegations of the power to tax would be unconstitutional.[6] The view of these courts is essentially that the power to impose

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[6] *National Cable,* 415 U.S. at 340; *Central & S. Motor Freight Tariff Ass'n v. United States,* 777 F.2d 722, 725 (D.C. Cir. 1985); *Sohio Transportation Co. v. United States,* 766 F.2d 499, 503 (Fed. Cir. 1985); *National*

(footnote continues)

charges unrelated to benefits is inherently too broad and without meaningful standards or limitations to be validly delegated.

However, as Petitioners argue, Petition at 19-20, even if delegation of the power to assess taxes is not *per se* unconstitutional, the standards of Section 7601 are insufficient to allow such delegation. Statutes attempting to delegate the critical power to impose taxes should be required to include stricter standards and more limited discretion than other delegations. Note, *The Assessment of Fees by Federal Agencies for Services to Individuals,* 94 Harv. L. Rev. 439, 443 (1980). But even under the usual requirements for a permissible delegation, the delegation in this case should be unconstitutional. *Industrial Union Department, AFL-CIO v. American Petroleum Institute,* 448 U.S. 607, 645-646 (1980); *Mid-America Pipeline Company, supra,* slip opinion. As discussed above, under the interpretation of the NRC and the majority below, the standards of Section 7601 are effectively meaningless, leaving the Commission virtually unfettered discretion to determine who among its licensees shall pay and how much they will pay.

The delegation doctrine is a keystone in the protection of our nation's liberties and democratic system of government. But if the doctrine is to fulfill this critical role, delegations can only be found to satisfy constitutional requirements when Congress provides substantive standards clearly circumscribing the delegated power. Ely, *Democracy and Distrust, A Theory of Judicial Review* 131-134; Schoenbrod, *The Delegation Doctrine: Could the Court Give It Substance?,* 83 Mich. L. Rev. 1223 (1984); Aranson, Gellhorn and Robinson, *A Theory of Legislative Delegation,* 68 Cornell L. Rev. 1 (1981); Freedman, *supra,* p. 7, at 78-94; Tribe, *supra,* p. 11, n.6, §§ 5-17, at 362-369.

(footnote continued)

Association of Broadcasters v. F.C.C., 554 F.2d 1118, 1129, n. 28 (D.C. Cir. 1976); *Mississippi Power & Light Co. v. NRC,* 601 F.2d 223, 227 (5th Cir. 1979), *cert. denied,* 444 U.S. 1102 (1980); *Mid-America Pipeline Co. v. Dole,* slip op. at 12; *See also* Tribe, *American Constitutional Law* §§ 5-17, at 366, n.15 (2d ed. 1988); Freedman, *supra,* p. 7, at 88; Note, *Constitutional Problems with the COBRA and OBRA Fee Schedules,* 9 Energy L.J. 107 (1988).

CONCLUSION

For the reasons stated, a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be issued and the case set for plenary review.

Respectfully submitted,

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No. 88-234

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FLORIDA POWER & LIGHT CO., *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA and
U.S. NUCLEAR REGULATORY COMMISSION,

Respondents.

BRIEF AS *AMICUS CURIAE* OF THE COMMITTEE ON NUCLEAR TECHNOLOGY AND LAW OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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Statement of Interest

The Committee on Nuclear Technology and Law (the "Committee") of The Association of the Bar of the City of New York (the "Association"), files this brief as *amicus curiae* with the consent of all parties, urging that the petition for a writ of certiorari be granted.

The Committee is one of the standing committees of the Association, a voluntary bar association with more than 18,000

members. In 1949, the Executive Committee of the Association adopted a resolution establishing a Committee on Atomic Energy, the predecessor to the Committee. That resolution established a mandate for the Committee to report on all matters relating to atomic energy. Since its inception, the Committee has actively participated in the consideration, development and interpretation of much of the proposed legislation and regulation in the field of atomic energy. In the proceedings in this case below before the Court of Appeals for the District of Columbia Circuit, the Committee participated as an *amicus curiae* with the leave of that court.

The decision below involves the constitutional validity of a final rule of the Nuclear Regulatory Commission ("NRC" or the "Commission") permitting the assessment of an annual, *per capita* sum-certain fee against the Commission's commercial reactor licensees amounting to up to one-third (1/3) of the NRC's aggregate annual budget. It presents a case of substantial public importance in the Committee's sphere of responsibility in that it controls in a direct and substantial way the basic manner in which regulation of nuclear power in the United States will be funded. Accordingly, an *amicus curiae* brief is desirable to insure that the important issues at stake are fully developed for the Court's review.

REASONS FOR GRANTING THE WRIT

A. As construed by the Commission, COBRA Section 7601 would comprise an unconstitutional delegation of the taxing power

On September 18, 1986, the NRC issued a final rule imposing on commercial nuclear reactor licensees an annual charge of $950,000 per reactor. 51 Fed. Reg. 33224, *codified at* 10 C.F.R. Part 171 (1987). The Commission's Part 171 regulations did not tailor the annual charge to services requested by particular licensees, nor was it keyed to the benefits inuring to specific licensees. The annual charge also failed to distinguish the benefits to the public associated with the regulation of the commer-

cial application of nuclear technologies. Rather, in construing its authority for the charge under Section 7601 of the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), which permitted the NRC to fund up to one-third (1/3) of its annual budget from such charges, the Commission chose to impose a *per capita*, uniform annual fee which includes among its cost bases such items as NRC reactor research programs. The validity of such a charge was subsequently challenged by the petitioners in the court below.

In addressing the issue of unconstitutional delegation of the taxing power, the majority below held that "even if the NRC assessment were characterized as a 'tax' rather than a 'fee,' this delegation would meet constitutional limitations." *Florida Power & Light Co. v. U.S.*, 846 F.2d 765, 772 (D.C. Cir. 1988). In so stating, the court disregarded profound issues of constitutional sensitivity to congressional control of taxation and instead resorted to a narrow and cramped interpretation of this Court's rulings in *National Cable Television Ass'n v. U.S.*, 415 U.S. 336 (1974) and *Federal Power Comm'n v. New England Power Co.*, 415 U.S. 345 (1974). The court below also misapplied this Court's prior decision in *Hampton & Co. v. U.S.*, 276 U.S. 394 (1928).

Wholly apart from questions as to the constitutionally permissible outer limits of taxation delegability, it is virtually inconceivable that in enacting COBRA Section 7601, Congress could have thought that it was conferring its exclusive powers to engage in taxation on the Commission. Surely much clearer language would have been adopted by Congress to achieve such a purpose, even if the taxation power were assumed to be delegable. Thus a major concern inherent in the decision below is its sanctioning of a casual delegation of congressional taxing authority.

The language of COBRA Section 7601 gives no evidence that Congress contemplated an unusual delegation of its taxing

authority to the NRC.[1] Rather, COBRA Section 7601(b) directs NRC to:

> "assess and collect annual charges from its licensees . . . except that . . . any such charge . . . shall be reasonably related to the regulatory service provided by the Commission and shall fairly reflect the cost to the Commission of providing such service."

While the legislative history indicates that COBRA Section 7601 was enacted "to establish a standard separate and distinct from the Commission's existing authority under the [Independent Offices Appropriation Act of 1952]," that standard was designed to effect a distinct and separate fee program and not a tax. As the Congressional Managers of COBRA noted in discussing Section 7601's limitations:

> "This authority is not intended, however, to authorize the Commission to recover any costs that are not reasonably related to the regulatory service provided by the Commission, nor is it intended to authorize the Commission to recover any costs beyond those that, in the judgment of the Commission, fairly reflect the cost to the Commission of providing a regulatory service." *Statement of Managers Re NRC Fees*, 132 Cong. Rec. H879, March 6, 1986 (daily ed.)

This is hardly the language Congress would have used had a delegation of taxing authority been intended. As Judge Starr noted in dissent below, " 'it is . . . wholly inappropriate to

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1 The Committee does not disagree with that portion of the opinion below contending that Congress may legitimately delegate the details of implementation of congressionally authorized taxing authority when it provides sufficient standards and guidance to the agency upon whom such authority is delegated. *See Florida Power & Light Co. v. U.S.*, *supra*, 846 F.2d at 773-76 discussing *Schecter Poultry Corp. v. United States*, 295 U.S. 495 (1935) and *Hampton & Co. v. United States*, 276 U.S. 394 (1928). Clearly, however, no such delegation was intended by Congress here, and NRC has impermissibly appropriated "authority and discretion" over questions of legislative policy.

assume that, without having made its intention express, Congress empowered the NRC to enter into what, at best, must be regarded as a constitutionally unchartered area.' " *See Florida Power & Light Co. v. U.S.*, *supra*, 846 F.2d at 780. Interpretation of this authority as granting anything more than the power to exact a fee for specific services to the specific beneficiaries of the NRC's regulatory efforts would necessarily infer a more purposeful delegation of congressional prerogatives than could have been intended.

Even if Congress could be deemed to have intended to delegate its taxing powers in enacting Section 7601, the essentially unlimited guidance given to the NRC was wholly insufficient to sustain the constitutionality of the delegation. The majority below found adequate standards for delegation in Congress' requirement that the charges be "reasonably related to the regulatory services provided," and that the charges "fairly reflect the cost to the Commission of providing such service." As discussed below, however, the Commission has applied these "standards" in a fashion which does not require any linkage between the charges to particular licensees and the benefit to them of particular services which they have requested. The NRC's rule authorizes the agency itself to fund programs which it initiates, and to make such programs self-sustaining to the extent of 1/3 of their costs.[2] Under COBRA, Congress never set the level of charges the Commission was to collect (stating only that they could be up to 1/3 of its agency's budget), nor specified any formula pursuant to which the NRC was to set the charges. Moreover, the revenue-raising aspects of this 1/3 component are allocated among licensees on a basis which the agency solely determines.

Simultaneously reposing such sweeping revenue-raising powers with a federal agency, together with complete discretion over their manner of imposition, inevitably undermines control over the taxing power. The Constitution, however, clearly intended such functions to be tightly controlled by the demo-

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2 Acting under Section 5601 of the Omnibus Budget Reconciliation Act of 1987, NRC has now increased the self-sustaining share of its budget to 45%. 53 Fed. Reg. 30423 (1988).

cratic process. The NRC's charge removes direct accountability of elected officials over the taxation power and places it with Executive Branch officials, without significant guidance and subject only to minimal procedural controls and judicial restraints. The NRC charge also reduces or even eliminates constitutionally mandated congressional oversight of agency budgets by circumventing normal practice whereby the agency provides justification for its regulatory programs as an integral part of the congressional appropriations process.

In *Mid-America Pipeline Co. v. Dole*, Civ. No. 86-C-815E (N.D. Okla., filed September 4, 1986), *appeal pending sub nom. Burnley v. Mid-America Pipeline Co.*, No. 87-2098, October Term, 1987, a Department of Transportation ("DOT") fee program under Section 7005 of COBRA, similar to the fee program at issue in the instant case, was found unconstitutional by a federal district court. The *Mid-America* court undertook an extensive analysis of *Hampton & Co. v. United States*, *supra*, upon which the Court of Appeals relied in part for its decision below. The court noted that the delegation in *Hampton* was not one of taxing power, but rather a delegation of power to implement a tariff plan fully set out by Congress. Thus in *Hampton*, the delegated powers were merely ministerial in nature and did not give to the "executive office or agency the authority or discretion to determine what the law shall be." *Mid-America Pipeline*, *supra*, at p. 7.

Turning next to an analysis of the DOT's fee statute, the court in *Mid-America* found that Section 7005 of COBRA only authorized the imposition of aggregate fees not to exceed 105 percent of congressional appropriations for pipeline safety program enforcement, and that the only directive given by Congress to DOT for the assessment was that the fee bear a reasonable relationship to usage. *Id.* at 9. The court noted that:

> "[a]lthough the statute prescribes that the amount be 'based on the usage, in reasonable relationship to volume-miles, miles, revenues, or an appropriate combination thereof . . . ,' the fact is that the Secretary *is free to appropriate the cost of regulation in almost any way she*

sees fit. Due to the loose language of the statute, there is a wide-ranging potential impact on the individual pipeline facilities." (emphasis added) *Id.* at 9-10.

Accordingly, the court concluded that Section 7005 of COBRA asked more than aid in implementing a congressionally-established tax. Rather it permitted DOT to "*set* the rate of fees which is in fact a tax, and then go one step further and collect such taxes," in contravention to this Court's holdings in *National Cable* and *New England Power*. *Id.* at 11.

The NRC fees authorized under Section 7601 of COBRA are basically no different than the DOT fees authorized under Section 7005 and held to be unconstitutional. Just as the aggregate DOT fees were required not to exceed 105 percent of aggregate fiscal year appropriations, NRC fees were required not to exceed 33 percent of the Commission's fiscal year costs. Again, just as the DOT fees were to be established by the Secretary of Transportation based on usage, in reasonable relationship to several proposed factors, the NRC fees were to be "reasonably related to the regulatory service provided and . . . fairly reflect the cost" of such service. Indeed Congress gave DOT more specific guidance in setting its fee than NRC was provided in Section 7601. Congress provided no further instruction to NRC on how to set its fees.

Unlike *Hampton*, therefore, this Court is not confronted with an agency's ministerial function in setting fees laid down in detail by Congress. Instead, NRC has assumed discretion in implementing Section 7601. The district court's language in *Mid-America* is thus just as applicable here—"the [NRC] is free to appropriate the cost of regulation in almost any way [it] sees fit . . . [resulting] in a wide-ranging potential impact on the individual [licensees]." *Hampton* and *Mid-America*, therefore, stand in stark contrast to COBRA Section 7601 as applied by NRC here, where Congress has made no specific taxing determinations at all other than imposition of a ceiling equivalent to 1/3 of the agency's overall budget.

B. The Commission's Part 171 charges fail to conform to the constitutional limitations on agency revenue-raising which have been imposed by this Court in analogous circumstances

In the case at bar, the Commission has made the fundamental error of interpreting this Court's prior holdings in such cases as *National Cable* and *New England Power* as merely construing the Independent Offices Appropriation Act of 1952 ("IOAA"), rather than articulating constitutional limitations on taxation flowing from Article I, Section 8 of the Constitution. This Court held in connection with an interpretation of the IOAA that agency fees are constitutional only if they represent "specific charges for specific services to specific individuals or companies." *Federal Power Commission v. New England Power Co., supra*, 415 U.S. at 349; *National Cable Television Association v. United States*, 415 U.S. 336 (1974). Contrary to the majority's decision in the court below, we respectfully submit that the principles established by this Court in interpreting the IOAA transcend any notion of limited applicability to the IOAA alone and apply to COBRA as well.

Article I, Section 8, of the United States Constitution grants to the Congress the non-delegable "power to lay and collect taxes." In both *National Cable* and *New England Power*, the Court held that fees imposed by two federal agencies were in effect taxes, and could not be constitutionally levied by the agencies involved. In *National Cable*, the Court considered the constitutionality of an annual fee established by the Federal Communications Commission ("FCC") to be paid by cable television systems. The fee was challenged on the ground that the FCC was without authority to impose it. The Court first stated that:

> "[t]axation is a legislative function and Congress, which is the sole organ for levying taxes [footnote omitted], may act arbitrarily and disregard benefits bestowed by the Government on a taxpayer. . . . The public agency . . . may exact a fee for a grant which, presumably, bestows a bene-

fit on the applicant, not shared by other members of society." 415 U.S. at 340-41.

This Court then noted that the IOAA, the statutory authority for the FCC fee, must be narrowly read to avoid any conflict with constitutional restraints on delegation of power. The Court explained that although an agency regulates in the public interest, regulated parties may not be required to pay fees that also underwrite services rendered to the public. That is, regulated parties may not constitutionally be compelled to cover all of an agency's costs. *See*, 415 U.S. at 341-42. Thus, in order to guide the FCC in setting fees within constitutional limits, the Court reviewed the language of the IOAA and determined that " 'value to the recipient' is . . . the measure of the authorized fee." 415 U.S. at 342-43. In other words, federal administrative agencies may not constitutionally impose fees that exceed the value of the services to the recipient who is paying them.

In *New England Power*, 415 U.S. 345 (1974), *aff'g* 151 App. D.C. 371, 467 F.2d 425 (D.C. Cir. 1972), this Court was similarly critical of annual fees set by the Federal Power Commission ("FPC"). The FPC had assessed against jurisdictional electric utilities the balance of its annual costs for administering the Federal Power Act after deducting the costs relating to activities in respect of non-jurisdictional companies. The charges were allocated among the utilities based on wholesale sales and interchange of electricity. *See* 415 U.S. at 346-47. The FPC's costs of administering the Natural Gas Act's pipeline programs were allocated on the basis of deliveries in interstate commerce between all natural gas companies with $1 million or more in annual operating revenues. Natural gas producers were also charged for each new reserve certificated at a rate per volume. *See* 415 U.S. at 347-48.

In *New England Power*, the Court of Appeals had held that the agency was not statutorily authorized to impose the charges, and this Court agreed that such fees must be "specific charges for specific services to specific individuals or companies" to avoid a characterization as taxes. 415 U.S. at 349-50. The Court contemplated that such charges would be assessed for specific

services to identifiable recipients, such as the issuance of a license or permit. Such charges would be limited to the costs of providing the service and should not be used as a revenue raising device to maintain or initiate services without special benefit to the fee payer. The Court noted that the FPC's annual charge would have been assessed against every company subject to the agency's rulings even though some "companies . . . had no proceedings before the [FPC] during the year. . . ." 415 U.S. at 351. Thus, the regulated companies would not have been service recipients and would not have received any value for their fee payments. Any fee payments, therefore, would have been in the nature of a tax, which the agency could not impose.

These constitutional constraints imposed on IOAA fees are also applicable to COBRA. In *National Cable*, this Court noted that the grant of taxing power to a federal agency "would be such a sharp break with our traditions [that the IOAA must be read] narrowly as authorizing not a 'tax' but a 'fee'." 415 U.S. at 341.

National Cable and *New England Power* understandably did not promulgate the outer limits of "fee" assessments which could be imposed by agencies without offending constitutional limitations on the taxing power. However, the flat-fee, *per capita* assessments struck down in these cases—the same allocation basis selected by the NRC here—were characterized as taxes by this Court wholly independent of IOAA. In *National Cable* this Court stated unambiguously that "[s]uch assessments are in the nature of 'taxes' which under our constitutional regime are traditionally levied by Congress." 415 U.S. at 341.

Prior decisions of this Court, other Courts of Appeals, and other panels of the D.C. Circuit have consistently held that a constitutionally permissible fee must satisfy certain standards which the Commission's present regulations disregard. *See, e.g., Central and S. Motor Freight Tariff Association v. U.S.*, 777 F.2d 722 (D.C. Cir. 1985); *Nevada Power Co. v. Watt*, 711 F.2d 913 (10th Cir. 1983); *National Cable Television Association v. FCC*, 554 F.2d 1094 (D.C. Cir. 1976); *Electronic Industries Association v. FCC*, 554 F.2d 1109 (D.C. Cir. 1976);

National Association of Broadcasters v. FCC, 554 F.2d 1118 (D.C. Cir. 1976); *Capital Cities Communications, Inc. v. FCC*, 554 F.2d 1135 (D.C. Cir. 1976). These cases contain a common thread of inquiry which must be satisfied to meet constitutional standards:

> "First, the Commission must *justify* the assessment of a fee by a clear statement of the particular service or benefit which it is expected to reimburse. Second, it must calculate the *cost basis* for each fee assessed. This involves (a) an allocation of the specific direct and indirect expenses which form the cost basis for the fee to the smallest practical unit; (b) exclusion of any expenses incurred to serve an independent public interest; and (c) a public explanation of the specific expenses included in the cost basis for a particular fee, and an explanation of the criteria used to include or exclude particular terms. Finally, the Commission must set a fee calculated to return this cost basis at a *rate* which reasonably reflects the cost of the services performed and value conferred upon the payor." 554 F.2d at 1117, 554 F.2d at 1133 (emphasis in original).

It is abundantly clear that the NRC's charges which are here challenged are indistinguishable from costs that the agency incurs in regulating commercial applications of nuclear technology. It is beyond dispute that this protection of the public from nuclear hazards is the principal mission of the agency under the Atomic Energy Act, and forms the basis for the actual agency expenditures for which recovery is sought under the challenged "fee" scheme.

The court below found no exclusion of public benefit costs was necessary to sustain the validity of the program, stating that "we see no requirement that these generic costs, must be reduced by a portion artificially allocated to public benefit. . . ." *Florida Power & Light Co. v. U.S.*, *supra*, 846 F.2d at 769. Thus the basis of the NRC's regulations is at odds with ample prior authority. Without the partition between public interest costs and costs attributable to specific benefits conferred on licensees, the charges are clearly taxes.

The NRC's revenue raising program similarly offends the requirement that constitutionally permissible fees relate in a specifically identifiable way to costs incurred by the agency in providing services which are requested by particular licensees and benefit them specifically. As this Court noted in *National Cable*:

> "[A] fee is incident to voluntary act, *e.g.* a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station." 415 U.S at 340.

In the case at bar, the twenty-nine petitioners already have received the necessary consents from the NRC (or its predecessor agency) to engage in the licensed conduct of constructing and operating nuclear facilities. The petitioners already hold licenses which permit the conduct regulated by the NRC, subject only to the NRC's oversight in pursuit of the public interest that each licensee satisfy and comply with the terms and conditions of its license. Regulatory costs associated with obtaining licenses have long since been incurred by the agency and paid for by the individual licensees. Occasions do arise where individual licensees seek amendments to or modifications of their licenses which would allow them to change or alter the means by which they satisfy license requirements. The initiative for the processing of such license changes and the associated provision of regulatory services comes from individual licensees who are the specific beneficiaries of such changes. In such instances there is indeed a specific benefit inuring to specific licenses, thus satisfying constitutional standards.[3] However, the current scheme sweeps the constitutional distinctions of *National Cable* aside by not requiring the recaptured agency costs to be clearly identified with specific requests originating with particular licensees.

In past instances, this Court has granted certiorari because of "the importance of the questions presented and the conflicting

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3 The NRC has long had in place a fee program which captures all of the agency's costs associated with specific license-originating regulatory activities, *see* 10 C.F.R. Part 170.

views in the courts of appeals and the district courts." *Calhoon v. Harvey*, 379 U.S. 134, 137 (1964). *See also Heffron v. International Society for Krishna Consciousness*, 452 U.S. 640 (1981); *St. Martin Lutheran Church v. South Dakota*, 451 U.S. 772 (1981); *Massachusetts v. United States*, 435 U.S. 444 (1978). The conflict between the holding below and the holding in *Mid-America* could not be clearer and is based upon contradictory readings of almost identical statutory authorizations. It is of great importance that this Court provide both federal regulators and regulated parties with a definitive interpretation as to the constitutional limitations of congressionally authorized user fees. The increased and increasing dependence on user fees as a funding method by the federal government demands a clear determination regarding the scope of congressional and agency powers to impose such fees. The imposition and legality of such fees will undoubtedly be presented for judicial review again as Congress seeks alternative means of pursuing its regulatory agenda.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the petition for a writ of certiorari should be granted.

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Respectfully submitted,

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